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ABSTRACT

The problem of harassment of women in the workplace has received increasing attention from government agencies, Congress, and the courts in recent years. This growing general awareness of the problem of harassment and sex discrimination by both employers and employees is being made more acute by women's growing demands for career opportunities equal to men as well as for egalitarian, non-discriminatory, and harassment-free working conditions. The demand for solutions is therefore increasingly insistent. The alternative remedies open to women employees reflect alternatives for employers as well. The choices are that either ways are found for dealing effectively with the problem within the organization through fair administrative regulations and effective grievance procedures, or ways will be found outside the organization in the courts and through advocacy efforts. Either way, these choices cannot be made by the perpetrators or victims. Self-policing of harassment and discrimination is not possible in a system which promotes it, and effective complaint is not possible where there is ignorance of alternatives and intimidation. Given these circumstances, if regulations are to come from within the organization, as is generally desired, change must be initiated and implemented from the very top levels of administration. (Author/PAS)

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HARASSMENT AND DISCRIMINATION OF WOMEN IN EMPLOYMENT

Working Paper Prepared for the
Conference on Harassment in the Workplace
July 7-9, 1981

Gordon R. Chapman, Ed.

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Center for Women Policy Studies

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FOREWORD

The problem of harassment of women in the workplace has received increasing attention from government agencies, Congress, and the courts in recent years. Concern about the problem is expected to grow even larger in the 1980's as more women participate in the paid labor force and as more women enter "nontraditional" occupations, those formerly accessible only to men. Increases in the number of reported incidents of harassment as well as legal actions against employers have accompanied the influx of women into the paid labor market and into fields which formerly excluded them.

Perceptions about what conduct constitutes job harassment have also been changing. As a result the scope of legal definitions and criteria for actionable complaints have enlarged. These changes also account for the proportionately larger growth in the number of complaints than simple increases in female employment would produce.

While current discussions as well as court and agency actions regarding harassment have focused on overt sexual harassment, sex-related harassment or sex discrimination in the form prohibited by the Civil Rights Act of 1964 may be even more common. No one knows the full extent of the problem at the present time because of definitional problems and because of the lack of comprehensive studies. Similarly, the long-term effects and implications of harassment for the female employee and her employer have not been adequately studied. The exact relationship between harassment and changing patterns of female employment has also been hardly touched. Perhaps the area of most crucial need, no thorough overview of current legal developments is available at this time.

Recognizing these research needs in view of the great importance of the problem to improving the social and economic status of women, the Center for Women Policy Studies in 1979 began to examine potential areas to direct its efforts and to develop a comprehensive project on the problem of sexual harassment. This project developed out of the work of the Center in several related areas. The Center has conducted research and technical assistance projects on the subjects of rape and victimization since 1972. The Center has a continuing involvement in issues regarding family violence having established a resource center and newsletter and technical assistance to organizations in the field. A large part of the Center's work has focused on economic and legal issues relating to job-related discrimination and non-traditional employment since its inception.

The Center's project on harassment is aimed at identifying and defining issues, exploring legal and non-legal remedies for alleviating the problem, developing materials for public education and providing technical assistance materials for employers, victims, and organizations concened about these problems.

A national conference of researchers and other professionals who have been working on the problem of harassment is being organized by the Center to be held in July, 1981. The conference will explore developing issues in employment discrimination based on sex and examine the current state of knowledge about sexual harassment. Conference participants will examine the development of sexual harassment law and will develop strategies for using the law to remedy more subtle forms of discrimination. Use of non-legal remedies such as employer training, public education and counseling will also be addressed.

Several pieces of action-oriented research comprise the research and analysis portion of the CWPS harassment project so far. They include an intensive series of case studies of harassment victims, legal research on statutory remedies for subtle employment discrimination, and analysis of the largest existing data base on sexual harassment. The results of this research in its current stage are reflected in the paper which follows.

The purpose of this paper is to summarize current understandin nd knowledge about the problem of harassment of women in employment, e current state of legal remedies, and needs for employment policies ar employer actions to eradicate discrimination and provide for a basic level of job security. It is also intended to clarify the scope and the definition of sexual harassment in relation to sex discrimination.

The work of the conference will also be directed to developing and strengthening activities for fostering public awareness and concern about the problem of harassment. Following the conference, information and action technical assistance kits will be developed for women employees, employers, and litigators. Release of these materials will be accompanied by a public awareness campaign aimed at general media as well as the women's media.

Harassment and Discrimination of Women in Employment was prepared by the Center for Women Policy Studies under the supervision of Jane R. Chapman, Director. The paper was initiated by Lella Candea, based on her analysis of victim case studies in Federal employment. Growing out of her own experience as a victim of harassment and her close involvement with other harassed women, she has prepared a paper, "Abuse and Harassment of Women in the Workplace," which contains a classification of types of harassment. The CWPS wishes to acknowledge Ms. Candea's role in drawing attention to the problem of harassment of women as well as the encouragement she has provided to the Center in undertaking a major effort in this field. The legal analysis for the current paper was prepared by Lisa Lerman, Esq. The report was produced and edited by Gordon R. Chapman.

The Center wishes to acknowledge the assistance of Cindy Shaughnessey of the Merit Systems Protection Board, Office of Merit Systems Review and Studies. It would also like to thank The Playboy Foundation for its financial assistance.

INTRODUCTION

All women who work must do so with the expectation that they are likely to experience harassment at some time in their working lives. Many women experience it on a daily basis as part of the standard work environment. As many as 18,721,000 (42 percent) of all employed women in the U.S. experienced overt sexual harassment in 1980, based on representative estimates derived from a random sample of women in all occupations in the Federal government 1/ and labor force data from the U.S. Department of Labor. 2/

Sex discrimination, like racial and ethnic discrimination, has been found illegal by the courts based on constitutional and stautory guarantees of equality. Sex discrimnation includes two categories of behavior: (1) official employer policies differentiating between the sexes, and (2) discrimination expressed in individual behavior towards employees. This latter type of discrimination takes two forms: (a) overt sexual harassment, and (b) subtle or sexist harassment.

In the case of racial and ethnic discrimination, both official and unofficial actions have been recognized. But with sexual discrimination, until recently, only official employer policy was recognized. Recently, unofficial sex discrimination has been recognized in court action. The first form of unofficial discrimination in employment that has been recognized is overt sexual harassment. Not all unofficial discriminatory behavior is sexual. That which is not sexual is sexist.

The purpose of this paper is to explore the nature and extent of sex discrimination and harassment in employment and to derive an effective conceptual or definitional framework as the basis for dealing with the problem in legal and non-legal terms. This exploration draws on three sources: (1) legal and regulatory actions, (2) surveys of employees, and (3) victim studies. What has been learned from the last two sources strongly suggests the need for an expansion of the legal definition of sex discrimination as well as administrative regulations and management procedures to include subtle or sexist harassment in addition to overt sexual harassment. Because of the lack of comprehensive studies, no one knows the full extent of the problem of harassment at the present time. The few highly focused studies of different aspects of the problem which are available indicate a very complicated situation in which definitions tend to overlap. This paper, in its exploration of the problem, attempts to draw out available sources and to produce a synthesis in which harassment of women in employment is viewed broadly as a form of discrimination.

Harassment of women, like racial and ethnic harassment, has social, psychological, and economic consequences. This study is concerned with the effect of harassment in terms of direct denial of equal employment opportunities, a basis for complaint found acceptable by the courts. In

addition, overt sexual harassment and a workplace environment which includes subtle discrimination produces psychological damage which reduces the individual's ability to work effectively and impairs career opportunities. The study evaluates the potential scope of sexual harassment and sex discrimination through analysis of employee surveys and victim interviews.

All women experience the effect of discrimination in employment by virtue of the limitations in career options, employment opportunities, and income. The employment of women, like racial and ethnic minorities, is for the most part, confined to about 20 of the approximately 450 occupations identified by the Department of Labor. That these jobs are at the low end of the employment spectrum is indicated by the increasing gap in income between men and women since the 1960's when women began entering the labor market at a greater rate than at any time in history.

During the past 80 years, employment of women grew from about 5 million to over 44 million. Participation by women in employment during that time grew from 20 percent to over 51 percent, while as a percent of the total labor force, their participation grew from 18 percent to 42 percent. Although women were employed in greater numbers during the two world war periods it was with the expectation that they would make way for male veterans after the war. In fact female participation rates fell only slightly after wartime and soon recovered their steady increase. Although influenced by economic growth, female participation rates have continued to grow even during economic depressions. And the rate of growth has been exponential. Between 1900 and 1940, female participation grew about 10 percent, while it increased 100 percent between 1940 and 1980. 3/

Although more women are working than ever before, the majority occupy low level, low-paying jobs concentrated within a range of fewer than twenty occupations. While more women work, they are making less money at it and the income gap between men and women has steadily widened since 1960. Harassment also appears to have increased, although direct measures that are fully comprehensive are unavailable. The results of harassment and discrimination are obvious in the restriction of women to low paying jobs and in the obstacles which they encounter to upward mobility.

Although found at every level of employment, anecdotal and interview studies suggest that the greatest incidence of overt sexual harassment is found in entry situations.

DEFINITION OF HARASSMENT

The approach to defining harassment to be followed here draws upon two major sources, the courts and the victims. Sexual harassment has been declared illegal by the courts in recent years in response to growing pressures from the women's movement. Interaction between analysis of conditions of employment for women and litigation of complaints based on sex discrimination has produced, since the 1970's a more comprehensive and systematic concept of harassment than was previously applied.

In the development of legislation and litigation, sexual harrassment is viewed as one form of sex discrimination. In practice, sex discrimination and harassment often come from the same source. Victims of sexual harassment are also subjected to other types of sex discrimination and complainants alleging sexual harassment become subjected to intense sex discrimination. As defined here, based on victim interviews, sex discrimination is found in subtle harassment as well as retaliation. Rape and sexual abuse are subject to criminal prosecution; other sexual harassment is actionable as a form of sex discrimination.

In this chapter developments contributing towards expanding the legal definition of harrassment are examined first. The views of women employees including victims and non-victims, complainants and non-complainants, are then discussed in the second part of the chapter based on survey and interview data. The definition of harassment from the viewpoint of victims is more comprehensive, detailed and speculative, concerned more with effects than with legal basis for complaint. As such, it provides direction for expanding the scope of the law on social and economic grounds.

Legal Sources for the Definition of Harassment

Sex discrimination in employment touching on harassment is specifically prohibited under Title VII of the Civil Rights Act of 1964, as amended. (See Appendix A for full text of the "Final Interpretive Guidelines.") Sexual harassment is defined in the guidelines as one form of sex discrimination.

It is important to understand at the outset that the Federal prohibition of sexual harassment is based on its definition as one form of employment discrimination. This indicates the importance of legal prohibitions against sexual harassment deriving from actions taken by the courts. Other Federal laws on sex discrimination in employment relating to sexual harassment include the following:

1. Title VII of the Civil Rights Act of 1964, as Amended by the Equal Employment Opportunity Act of 1972, prohibits discrimination based on sex, as well as on race, color, religion, and national origin, in hiring or firing; wages; fringe benefits; referring, assigning, or promoting; extending or assigning use of facilities; training, retraining, or apprenticeships; or any other terms, conditions, or privileges of employment.

2. (PL 95-555, amendment to Title VII) states that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination.

3. The Equal Pay Act of 1963 (amendment to the Fair Labor Standards Act) prohibits pay discrimination because of sex.

4. Executive Order 11246, as Amended by Executive Order 11375, requires federal contracts to include language by which contractors pledge not to discriminate against any employee or applicant for employment because of sex, race, color, religion, or national origin. The contractor must further pledge to take affirmative action to insure nondiscriminatory treatment.

5. The Vocational Education Act, as amended requires provision of activities to eliminate sex bias, stereotyping, and discrimination in federally funded vocational education programs and requires each State to employ a full-time sex equity coordinator to ensure the elimination of bias and occupational segregation in these programs.

6. The Comprehensive Employment and Training Act (CETA) as reauthorized in 1978, prohibits sex discrimination with respect to participation in or employment in connection with any activity funded under the law. Prime sponsors (States, cities, counties, or combinations of general government units to whom most funds available under the law are allocated) must show in their annual plans the specific services planned for those who are experiencing severe handicaps in obtaining employment, including those who are displaced homemakers, or are 55 years of age or older, are single parents, or are women.

7. Title IX of the 1972 Civil Rights Act, states that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

8. The Women's Educational Equity Act of 1974, authorizes activities at all levels of education to overcome sex-stereotyping and achieve equity for women.

Harassment in the workplace, as experienced by the victim, includes conduct ranging from explicit demands for sexual favors to subtle derogatory remarks relating to the sex of an employee and to retaliatory action when an employee resists harassment. Only part of that conduct, that which may be proven in court to be invidious sex discrimination, is recognized in legal definitions of harassment. Though somewhat narrower than the experience of the victims, the legal definitions of sexual harassment are useful because they provide a systematic analysis of the types of conduct which constitute actionable harassment, the work relationship between the harasser and the victim within which acts of harassment are considered illegal, and the types of injury to the victim which are prerequisite to a legal claim. Analysis of the development of the legal definition of sexual harassment and comparison of harassment law with other rules which prohibit discrimination in employment illuminate changes needed in the law.

Definition of Sexual Harassment Under the Civil Rights Act of 1964. Sex discrimination in employment was prohibited by Federal law in Title VII of the Civil Rights Act of 1964. 4/ While workplace harassment may also be actionable under the U.S. Constitution, under other Federal laws, and under state employment discrimination and criminal laws, the major definitional development has occurred in court and administrative interpretation of Title VII. That development is the focus of the discussion which follows. 5/ Section 703(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

Until recently, sex discrimination against women in employment was deemed to include only offical employer policies that subjected women to terms and conditions of employment not imposed on men. Employer policies prohibited on these grounds include the requirement that women employees, but not men, change their names upon marriage 6/; a requirement that women make larger contributions to a pension plan based on the statistical likelihood of greater longevity 7/; a dual seniority system for men and women based on the requirement that male employees be able to lift more weight 8/; and a requirement that women employees remain single. 9/

The recognition of sexual harassment as illegal discrimination in terms and conditions of employment represents a major step toward extending the concept of discrimination to include subtle sex discrimination, not authorized by an official employer policy. Such discrimination is already prohibited in the case of race discrimination. It constitutes an acknowledgment that one employer may be liable for discrimination if the workplace atmosphere is charged with sex discrimination, even if it is not the result of stated policy.

Initial efforts to establish the illegality of sexual harassment under Title VII were unsuccessful. The district court in Arizona rejected a claim of sexual harassment based on examination of prior sex discrimination cases, finding that earlier complaints had succeeded only where "the discriminatory conduct complained of arose out of company policies." 10/ The court held that sexual advances by a supervisor towards an employee were "nothing more than a personal proclivity." In rejecting another claim of sexual harassment, a California district court stated that "the attraction of males to females and females to males is a natural phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions." 11/

In four 1977 decisions, however, courts found violations of Title VII where a supervisor demanded that a subordinate employee engage in sexual relations as a condition of her continued employment and where the employee's refusal resulted in termination of employment. The employers held liable had all been informed of the harassment and had failed to investigate or take corrective action. 12/ Extreme forms of harassment were alleged in all of these cases -- all involved demands that an employee engage in sexual relations where refusal resulted in termination. The language used by some courts in defining sexual harassment, however, broadened the law beyond the facts presented by the case. In Barnes v. Costle, for example, the court stated that:

> The vitiating factor thus stemmed not from the fact that what appellant's superior demanded was sexual activity... but from the fact that he imposed upon her tenure in her then position a condition which ostensibly he would not have fastened upon a male employee. 13/

This statement suggests that any condition of employment which is imposed on women but not on men is illegal sex discrimination against women.

The Court of Appeals in Tomkins defined that injury to a victim of harassment which would be actionable under Title VII. As in Barnes, the decision expounded more law than was needed to decide the facts presented:

> Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status -- evaluation, continued employment, promotion, or other aspects of career development -- on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge. 14/ (italics supplied).

Early court decisions on sexual harassment suggested that only action by "employer" -- not "supervisor" or "co-worker" -- was illegal under Title VII. However, the recent decisions discussed above make clear that an employer may be held liable for the conduct of a supervisor toward an employee, at least if a complaint was filed but not investigated or redressed 15/, but possibly even if the employer was unaware of the supervisor's conduct. 16/

The courts are divided on the issue of whether or not an employer policy tolerating harassment must be alleged 17/, or whether a single incident of harassment is sufficient to create a cause of action. 18/

Following the federal court decisions interpreting Title VII discussed above, EEOC issued guidelines which codify and extend the definition of actionable sexual harassment articulated by the courts. The final guidelines issued November 10, 1980 state:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submissions to such conduct of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 19/

These guidelines also explain that an employer may be held liable for the conduct of its agents and supervisory employees "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." In responding to comments on the proposed guidelines which suggested that this language was too broad, the Commission explained that "the strict liability imposed in § 1604.11(c) is in keeping with the general standard of employer liability with respect to agents and supervisory employees."

An employer can be held responsible for harassment in the workplace by fellow employees if "the employer (or its agents or supervisory employees) knows or should have known of the the conduct." A similar standard of liability is articulated for the action of non-employees in the workplace, with the additional provision that "In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." In fact, employers are encouraged to "take all steps necessary to prevent sexual harassment from occurring." In some respects these regulations extend the definition of sexual harassment beyond that currently recognized by the courts.

Boundaries of the Law. Title VII of the Civil Rights Act of 1964 equally prohibits employment discrimination based on race and based on sex. However, in enforcing the law, the courts have recognized as actionable far more subtle forms of race discrimination than sex discrimination. The prohibition of sexual harassment is a step toward providing women (or men) with protection from discrimination equal to that provided to minorities. The EEOC guidelines, may be interpreted in a way that broadens the legal definition of harassment and applies to sex discrimination complaints principles which have been developed in handling racial and ethnic discrimination. The issues on which broader interpretation of the law is most needed include:

(1) the recognition of subtle forms of harassment as actionable, including derogatory sexual remarks, intimidation, and other differential treatment of women based on sex which affects the terms or conditions of their employment.

(2) the recognition that an employer may be held responsible for a single incident of harassment even if he had no actual knowledge of the incident.

(3) the recognition that harassment not only by employers or supervisors, but also by co-workers or customers, may create a cause of action.

1. Subtle Discrimination. Many recent Federal court decisions have narrowly defined the conduct which is illegal under Title VII, and have also required that for such conduct to be actionable there must be some tangible detriment to the "terms, conditions, or privileges of employment." In Bundy v. Jackson, 20/ the U.S. Court of Appeals for the District of Columbia held that "sexual harassment, even if it does not result in the loss of tangible job benefits, is illegal sex discrimination." 21/ The court accepted the plaintiff's claim that,

> "conditions of employment" include the psychological and emotional work environment -- that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation ... illegally poisoned that environment. 22/

The court found that actions creating a discriminatory environment were by themselves illegal, based on cases finding similar conduct illegal when the alleged discrimination was based on race or ethnicity. The court stated that,

> Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal? 23/

The Court of Appeals noted that implicit in this recognition of subtle acts which create a discriminatory atmosphere is a rejection of the notion that a victim of harassment must show that she resisted the employer's advances. To require a showing of resistance would create a "Catch-22," in which an employer may freely harass his employee as long as he takes no overt action which would call for explicit rejection. The court explained that: "If the employer demands no response to his verbal or physical gestures other than good-natured tolerance, the woman has no means of communicating her rejection. She neither accepts nor rejects the advances; she simply endures them." 24/ Therefore, the court suggested that "it may ... be pointless" to require proof of resistance to advances.

A recent decision by the The Minnesota Supreme Court has taken the lead in recognizing that harassment may encompass far more than demands for sexual compliance. In Continental Can v. Minnesota, 25/ the court held the state discrimination law to be violated by repeated derogatory remarks and physical conduct directed toward a female employee by others in the workplace. The court stated that:

> Differential treatment on the basis of sex is more readily recognizable when promotion or retention of employment is conditioned on dispensation of sexual favors. It is as invidious, although less recognizable, when employment is conditioned either explicitly or impliedly on adapting to a workplace in which repeated and unwelcome sexually derogatory remarks and sexually motivated physical conduct are directed at an employee because she is female. 26/

In the amicus (friend of the Court) brief submitted by the National Organization for Women in the Continental Can case, sexual harassment was defined as, "any repeated or unwarranted verbal or physical sexual advances, sexually-explicit derogatory remarks made by someone in the workplace which is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation or which interferes with the recipient's job performance." 27/

This broadened definition is consistent with EEOC guidelines on race discrimination which declare that "behavior which is directed at members of a racial or ethnic group and which evokes memories of past subordinate treatment creates an illegal workplace atmosphere." 28/ Under these regulations, EEOC decisions have held it discriminatory, for example, to permit whites to be addressed as Mr. or Mrs., and blacks by their first names. 29/ Likewise, it is illegal to require blacks to use exaggerated courtesy titles in addressing whites, or to allow employees to make derogatory ethnic jokes or to expose blacks to racist grafitti. 30/ In explaining the importance of recognizing subtle discrimination, the Fifth Circuit Court of Appeals explained that "terms, conditions and privileges of employment" under Title VII is "an expansive concept which sweeps within its protective ambit [sphere of influence] the practice of creating a working environment heavily charged with ethnic or racial discrimination." 31/ One commentator observed that:

> If sexual stereotypes in the workplace are unlawful bases for fundamental employer decisions -- and if racial stereotypes create prohibited employment conditions when they permeate the work atmosphere -- then, by analogy, conduct which perpetuates sexual stereotypes in the workplace should be deemed an impermissible condition of employment. 32/

The definition of what conduct is actionable as sexual harassment under the EEOC guidelines appears narrow and specific but, in fact, is susceptible of broad interpretation. "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" could be narrowly interpreted to include derogatory remarks or behavior related to the gender of the employee only where there was some explicit sexual reference. However, if the guidelines could be interpreted consistently with the definition of discrimination to include any differential treatment on the basis of sex which affects terms and conditions of employment, then the word "sexual" might be interpreted to include sexist behavior even if not explicitly sexual. Because the explanation of the guidelines repeatedly articulates adherence to traditional Title VII principles, this broader interpretation is probably correct.

2. Who May Be Held Liable. Federal courts deciding sexual harassment claims have extensively debated under what circumstances an employer might be held liable for the acts of a supervisor. 33/ In some cases, employers were held responsible only when the supervisor was found to be acting as an agent for the employer.

This narrow analysis is a departure from the general rule for employer liability for discrimination under Title VII, under which employers have been held liable whether or not they were aware of alleged discrimination. 34/ Employers have been held liable even if they had policies prohibiting discrimination 35/, and even if there was no record of prior discrimination by the employer. 36/ The new guidelines issued by EEOC make the employer strictly liable for sexual harassment, whenever the harasser was an "agent or supervisor." 37/

3. Harassment by Co-workers and Customers. At the present time the Federal courts, have prohibited harassment by employers and supervisors but not by co-workers or customers. The distinction is based on the assumption that "terms and conditions of employment" are imposed only by supervisory level personnel or that only supervisors are in a position to make acceptance of harassment a condition of continued employment.

In cases of race discrimination, however, employers have been held liable for allowing behavior in the workplace which creates a discriminatory atmosphere. 38/ In a workplace where women are employed as sexual objects for the pleasure of customers, such as topless bars, willingness or ability to deal with harassment is usually a condition of employment

even though supervisors or co-workers may not harass employees. Claims of discrimination based on such harassment might be opposed based on an argument that the woman voluntarily accepted the job. However, a victim of harassment might well want a job as a topless dancer but not wish to be harassed. In such a case an employer could be held liable for creating conditions of work conducive to harassment.

Likewise if an employee is harassed by co-workers and is unable to persuade her employer to prevent that the harassment, the employer could be found to have created a discriminatory atomosphere affecting conditions of employment. This was the finding in Continental Can v. Minnesota, 39/ in which the Minnesota Supreme Court ruled that an employer is liable for sexual harassment of an employee by her co-workers.

The EEOC guidelines on sexual harassment appear to address at least some of these problems; an employer may be liable for harassment of employees by anyone in the workplace if he knew or should have known that the harassment was taking place.

In the legal literature presented above, the definition of sexual harassment was found to have evolved through court decisions and EEOC guidelines interpreting Title VII; at first only the most extreme forms of sexual harassment were recognized, but the definition was broadened over time. The responsibility of employers for sexual harassment by others in the workplace, if not the scope of behavior considered as sexual harassment, was widened significantly by the EEOC guidelines issued in 1980.

The guidelines are susceptible of broad interpretation, to make sexual harassment as illegal as other forms of discrimination in employment. The approval of the guidelines, while a significant step, is only the beginning of a long struggle to persuade the courts to treat subtle discrimination against women in the workplace as a serious problem.

Survey of Harassment in Employment

Beginning in the 1970's, an increasing number of surveys and case studies have produced greater insights into the size and scope of the problem of sexual harassment. While definitional guidelines provided by the Civil Rights Act of 1964 were found to be inadequate and ambiguous, these studies also indicated the necessity of a broad approach to sexual harassment based on its particular and insidious characteristics and the way in which it is manifested in the work environment. Although almost all of the statistical surveys were small, self-selected, and therefore not necessarily representative samples, and although all were confined to observations about overt sexual behaviors (as against subtle, sexist or sex-related discrimination), they did establish general categories of sexual harassment which have tended to become standard, providing the basis for what the courts increasingly find to be actionable complaints.

There also emerged from these studies general agreement as to the relative seriousness and importance of the identified categories. The primary types of sexual harassment were found to be verbal and physical with the greater number of victims having experienced the verbal form. Three additional categories were established: visual; pressure; and the use of letters, the telephone or other means of communication.

In 1980 the first comprehensive national survey of sexual harassment was initiated by the U.S. Merit Systems Protection Board. This survey of both men and women began by defining sexual harassment in the restricted sense indicated by the OPM regulations. However, the study later expanded and clarified the scope of behavior to be included on the basis of a pre-test survey of employees. As the result of its pre-survey, including interviews with employees, seven categories of sexual harassment were developed. These were included in the final survey, which asked respondents selected randomly (and thus the full Federal workplace) for their observations of incidents of harassment to themselves during the 24-month period from May, 1978 to May, 1980. (The survey instrument will be included in the final report of the Merit Systems study to be published in April.) Preliminary findings from the survey were released September 25, 1980, in hearings before the Sub-Committee on Investigations of the Committee on Post Office and Civil Service of the House of Representatives.

The following categories were identified and evaluated in the survey:

1. Actual or attempted rape or sexual assault.

2. Unwanted letters, phone calls, or materials of a sexual nature.

3. Unwanted pressure for sexual favors.

4. Unwanted deliberate touching, leaning over, cornering, or pinching.

5. Unwanted pressure for dates.

6. Unwanted sexually suggestive looks or gestures.

7. Unwanted sexual teasing, jokes, remarks, or questions.

The categories above are listed in descending order based on respondents agreement of what constitutes sexual harassment. In addition, the study group combined the categories in its analysis under three general headings of seriousness:

1. Actual or attempted rape or sexual assault.

2. Severe harassment (items 2, 3, and 4, above).

3. Less severe harassment (items 5, 6, and 7, above).

Interviews of Victims of Harassment

Taken together, the categories of sexual harassment identified from all of the sources above -- the courts, the regulations, and employees in general differ widely in terms of the the seriousness with which they are viewed. The Merit Systems survey showed that men and women differ sharply regarding the seriousness of the less severe categories though agreeing substantially about the severe categories. Interviews with women who consider themselves to have been victims of harassment show wide differences in the definition of sexual harassment. This is especially the case where the behavior described lies below the threshold of actionable complaint.

A study published in 1980 by the U.S. Department of Education, examined sexual harassment of post secondary school students based on anecdotal information. 40/ Although this study had a somewhat different emphasis than one might expect from an employee survey in that it was directed to a student population in academic settings, the behavior reported on is more or less the same type as that reported to be offensive by employees. In approaching the problem of definition, the report stated:

> Rather than choose among the myriad, sometimes conflicting definitions of sexual harassment currently in use, (The National Advisory Council on Women's Educational Programs, which produced the report) opted to structure its Call for Information without a definition in the hope of developing a victim based definition from the responses. This approach permitted the problem to define itself and avoided limiting responses to fit any particular bias or ideology. The Council viewed this as particularly important in light of its attempt to analyze sexual harassment in a frontier area; most of the work done to date has dealt with employment situations which differ in many respects from the situations faced by students. The results of this approach were several:
>
> - Respondents described a wider range of incidents as "sexual harassment" than most existing definitions permit; the spectrum included rapes as well as nonsalacious slurs about the gender of the respondents;
>
> - Much of the activity reported appears malevolent in effect but not necessarily in intent; in many cases, the perpetrator does not appear to understand his behavior as "harassment" of any kind;
>
> - Respondents often distinguished between offers to reward sexual cooperativeness and promises to punish sexual non-cooperativeness — the two did not always escalate from requests to demands;

- Sexual overtures void of any promise or threat were described by a number of respondents as sexual harassment, especially when repeated; and,

- Individual students reflected great variety in describing what constituted "unacceptable" behavior and in providing definitions for sexual harassment.

These general factors led the Council to a working definition:

> Academic sexual harassment is the use of authority to emphasize the sexuality or sexual identity of a student in a manner which prevents or impairs that student's full enjoyment of educational benefits, climate, or opportunities.

Essentially, five types of activity were described as sexual harassment:

1. Generalized sexist remarks or behavior;

2. Inappropriate and offensive, but essentially sanction-free sexual advances;

3. Solicitation of sexual activity or other sex-linked behavior by promise of rewards;

4. Coercion of sexual activity by threat of punishment; and,

5. Sexual assaults.

These types, or categories, are not sharply delineated, although they are arranged in a roughly hierarchical continuum. Many of the reported incidents involve several categories, as when a student is promised something in exchange for sexual favors and simultaneously threatened about non-cooperation. Thus, the hierarchy of the categories is only approximate, since factors unique to any particular case may magnify its relative weight. For example, punishment-free sexual advances accompanied by touching might be viewed by some as considerably more threatening or injurious than an offhand offer to better a grade in return for a sexual encounter.

It is the common threads among the categories that provide the basis for a victim-generated definition of sexual harassment -- irrespective of the sex of the offender -- in the education context. These common elements are:

- Distortion of a formal, sex neutral relationship (e.g., teacher/student, counselor/client) by an unwelcome, nonreciprocal emphasis on the sexuality or sexual identity of the student; and,

- Infliction of harm on the student.

Several persons who commented on this report in pre-publication review indicated a belief that these complaints were not actually "sexual harassment" to the extent that they do not involve sexuality, per se, but sex bias and/or stereotyping. These commenters felt that "sexual harassment" should be limited to use as a descriptive phrase for acts involving either attempted or realized sexual encounters. Others disagreed, and felt that there is an inherent sexual content "in or underlying generalized sexist remarks or behavior, which often establishes a tone or context which in its awkwardness is more damaging than many overt acts."

To the major aspects of harassment can be added the central or "gut" issue of sexual harassment in employment -- discrimination and denial of equal employment opportunities.

As in the Report on the Sexual Harassment of Students, interviews of self-selected victims and complainants about incidents in the workplace tend to go beyond the definition of sexual harassment found to be legally actionable thus far as well as the focus on overt behavior found in the Merit Systems study, the restricted definition discussed in the footnote above. Informal interviews with employee victims by Lella Candea tend to support the five types of activity listed above found in post secondary educational institutions. In this case also there is a wider variety of incidents considered as sexual harassment than those considered in the Merit Systems study. From this more comprehensive consideration and definition of harassment by Candea, the following general categories were suggested: 41/

1. Sexual harassment and abuse involving force and aggression. In this case harassment may involve violence and has been found to derive from interpersonal relationships involving job related positions of power and vulnerability.

2. Overt sexist harassment.

3. Non-explicit, sexist harassment deriving from working conditions, practices, and expectations developed by and for men, and intentional efforts by men to protect their prerogatives.

4. Retaliation and punishment. This frequently involves blacklisting, isolation, poor work assignment, reassignment, revoking of perquisites, firing, or all of these measures.

The Merit Systems study clearly shows the seriousness and widespread extent of sexual harassment of the explicit types indicated in items 1 and 2, above. However, many nonexplicit or subtle discriminatory practices in employment are not covered as obviously by the category of sexual harassment. These less specific instances are of a type otherwise recognized by the prohibitions against discrimination of the Civil Rights

Act of 1964. However, instances of subtle discrimination will, undoubtedly, remain below the threshold of what the courts could consider an actionable complaint unless possibly as a class action suit where an employer has established an environment or atmosphere of harassment based on subtle discrimination. Similarly, explicit sexist harassment is not easily found actionable.

Non-explicit Minor Harassment, deriving as it does from the work environment itself, often takes the form of numerous minor irritants. Since they are inherently part of the job they do not necessarily come from any one individual and thus are difficult to present in the form of a complaint. The vulnerability of the new employee, especially a woman in a non-traditional setting is made worse by the initiation rites frequently part of a new job, whether malice is involved or not. Even more unacceptable, however, such conditions are often more or less permanent for the woman employee where aspects of the initiation never end. Rowe has described this type of harassment as involving "micro-inequities" ... petty incidents that damage, demean, and restrict women. Harassment of this sort has a general character which Rowe terms "The Saturn's Rings Phenomenon:"

> These minutiae are usually not actionable; most are such petty incidents that they may not even be identified, much less protested. They are important, like the dust and ice in Saturn's rings because, taken together, they constitute formidable barriers. As Saturn is partially obscured by its rings, so are good jobs partially obscured for women by "grains of sand:" the minutiae of discrimination. 42/

Karen Bogart has developed an institutional self-study guide on sex equity to be published in 1981. 43/ Working with Rowe's concept, Bogart identified specific "micro-inequities" based on a survey and interviews with key observers knowledgeable about the treatment of women, staff, and students in post secondary educational institutions. The following forms of subtle discrimination against women were most often reported in the study:

> Condescension: The refusal to take women seriously, as students or colleagues, communicated through posture, gesture, and tone of voice.
>
> Role stereotyping: Expectation of behavior that conforms to the sex role stereotypes, such as passivity and deference in demeanor, and traditional course and career choices.
>
> Sexist comments: Expressions of derogatory beliefs about women, such as the sentiments that women are inferior, lacking in originality, not serious, not intelligent and a distraction.
>
> Hostility: Avoidance, expressions of annoyance, resentment, anger, and jokes and innuendoes at the expense of women.

Exclusion: Unintentional and intentional oversights denying women access to events (e.g., departmental functions where information needed for upward mobility may be informally exchanged).

Denial of status and authority: The refusal to acknowledge a women's position or her scope of authority (e.g., the bypassing of a woman staff member by subordinates reporting to her superiors).

Invisibility: The failure to recognize the presence or contributions of women (for example, in course content).

Double standards: Differential evaluation of behavior as a function of gender attribution (e.g., the application of more stringent criteria in evaluating a woman's candidacy for tenure than a man's candidacy).

Tokenism: The discretionary inclusion of one or a few women only (e.g., as committee members or speakers).

Divide and conquer: The use of tactics that maximize the social distance of women from each other (e.g., informing a woman that she is superior to other women in ability or achievement).

Backlash: The rejection of women and men who support efforts to improve the status of women (e.g., by forgetting to include them in departmental functions).

Explicit Sexist Harassment produces a general condition or atmosphere of abuse which results from verbal insults such as graffiti on walls, demeaning jokes and comments, seemingly intentional inconveniences or direct personal observations and complaints, threats of firing, use of transfer and reorganization of tasks, claims of insubordination and insult, restrictive and intolerant supervisory attitudes, and the like. Supervisory mistreatment of female employees is frequently observed as a form of sexist behavior comprising sexual harassment. Shouting and other irrational outbursts by supervisory personnel are the common complaints in this category. Pregnant women and working mothers often experience a special form of this type of harassment whether from lack of tolerance and understanding about their special needs and circumstances or active disapproval of pregnant female employees. Since a large proportion of working women are mothers this problem is a key issue related to conditions of employment. Nor is the problem exclusively associated with non-traditional employment. Resolving the problem requires the use of flex-time, part-time employment programs, availability of day care and other conveniences all of which, though growing in use are found as yet in few places.

Overt sexual harassment is the most specifically and directly related to sex acts. Harassment here includes the range of behavior described in the Merit Systems study. The most severe form of overt sexual harassment, aside from rape and assault which are considered

criminal acts, is referred to in the Merit Systems study as "unwanted pressure for sexual favors." Such pressure can take that form of extortion referred to frequently as "executive rape." In these cases the threats are most often financial or economic and the promise of reward for compliance is combined with the threat of loss of job, demotion, or denial of job opportunities.

While physical assaults are generally considered to be criminal behavior, the range of such behavior includes acts which are not clearly in that category yet constitute a persistent aspect of the work environment especially in nontraditional employment. According to recent testimony before Congress, this type of abuse has frequently been found in the armed forces. In another instance, the shipbuilding industry, women who began working with men in areas sexually integrated for the first time, experienced constant physical assaults.

Sexual harassment of the overt type has frequently been found to involve the double bind of promised reward and threat of punishment. In addition, retaliation may follow after an employee who has been fired, forced to quit or who has filed formal suit or grievance. Many employees report that they have been victimized by retaliatory acts which interfere with their job rights and career after they complain to their superiors and administrative officers about some initial instance of harassment. When this harassment was made the subject of a formal complaint still greater harassment would result. Often this escalation continues even after court orders to cease and desist.

In one such instance, women filing equal opportunity complaints were subjected to attempts to fire them by their employer, the U.S. Department of Justice. In Smith vs. Kleindiest, 44/ which resulted from these attempts, Ms. Smith obtained a consent order from the U.S. District Court, in which the Department agreed not to further harass the EEO complainants. Frequently, escalating retaliatory harassment is carried out over a protracted period, perhaps lasting several years or through the entire career of an individual. In Smith vs. Kleindiest, Ms. Smith, who had filed a routine equal employment opportunity complaint, was deprived of her secretary, duties and office space within 24 hours. Later, when she filed a harassment complaint, three separate attempts were made by the Department to transfer her to another part of the organization. After Ms. Smith obtained a consent decree from the court, the retaliation diminished. When her original complaint was decided in her favor, however, the harassment intensified. She received a letter of reprimand and other actions were initiated to prepare a justification for firing her. At this point she resigned and filed another EEO complaint claiming that she had been harassed into quitting.

Two years later, Ms. Smith was ordered reinstated with two years back pay. Within the year, however, her office abolished her job thus forcing her termination. At the same time, the agency hired another person to fill a position which she had filled earlier and, presumably, might have filled on an interim basis. Her appeals to higher levels for a halt to these actions were almost entirely unsuccessful. It was nine months before she was able to find another position at the same level with another agency. In her original job, four separate sex discrimination cases over five years led to her final termination. In her new job, she began to experience new difficulties when her supervisor on discovering her past complaints criticized her as "disloyal." Eventually, after two more years during which she experienced similar harassment, she was forced to leave that job. While such an experience appears unusual at first, many equal employment opportunity complainants report that retaliation following the filing of a complaint has been the rule rather than the exception. 45/

THE EXTENT AND CONSEQUENCES OF HARASSMENT

Definitive knowledge of the extent of the broad range of harassment of women in employment has been difficult to come by. While the problem itself is not new, awareness of it, especially the full scope, has developed only in the past several years. This may be because of growing knowledge about the full range of consequences which negative interpersonal behavior can have in psychological and physiological terms which impact, in turn, on career aspirations and attainments. It may be because standards for human behavior are changing with the growing consciousness and concern regarding male/female relationships and it may also be that in socio-economic terms, as women have begun to compete with men for an equitable share of the labor market, the consequences of harassment have become more acute and less tolerable. This latter concern appears to be what underlies civil rights litigation and employment policies evolving through court cases and legislation.

The definition of sexual harassment was found to vary widely among complainants as well as those engaged in analyzing it -- the courts and, regulatory agencies no less than research scholars. For this reason the extent of sexual harassment is somewhat debatable but not unrelated to evaluating the gravity of the problem and to selecting the most appropriate approach for dealing with it.

Two of the most publicized surveys of sexual harassment of women in employment found that 92 percent of their respondents considered it "a serious problem." Almost that many -- 88 percent in the case of a survey of the readers of Redbook Magazine 46/ and 70 percent in a survey of the membership of the Working Women's Institute 47/ -- had "experienced some form of sexual harassment" on the job. However, both of these surveys were self-selected, that is, not strictly random samples from the general population of working women. It is not surprising that the Merit Systems Survey of Sexual Harassment in the Federal Workplace, which constituted a random sample of 23,000 employees (men and women), found that 42 percent of the women, the equivalent of 294,000 of the total 694,000 women employed by the Federal government, had experienced some form of sexual harassment in the 24-month period covered by the survey. 48/ Considering in addition the definition used in the survey (which did not include subtle sexual harassment as defined above in Chapter 2), 42 percent should be considered to be highly significant, indicating a substantial incidence of such activity if not its seriousness.

What the Merit Systems Study Shows

Of major significance regarding the Merit Systems Study is the fact that it is highly representative of the total work force. Thus, the 42 percent of women employees in the Federal government who reported incidents of overt sexual harassment can be projected roughly to 18-19 million employees in the total U.S. labor force for 1980.

In terms of the extent of the problem, that 42 percent of female respondents in the Merit Systems study had experienced some form of overt sexual harassment during the period studied would put sexual harassment in employment in the category of other major sex-related social problems affecting the status of women: family violence, rape, and incest. Charts 1 and 2 show that the rate at which incidents of harassment took place declined with the degree of severity as defined by the study. */

Within the larger group of women victims, about 76 percent were willing to describe a critical incident in detail (provided for by Section 4 of the survey). Many respondents had experienced more than one incident during the 24-month period of the study. In addition, the behavior which they had experienced was sometimes described appropriately under more than one category. The results of their reports represented in Chart 2 are substantially more critical than those for the total group of women surveyed.

The number of reports of incidents falling into the "less severe" categories (looks, dates and teasing, is defined above) is substantially greater than in the "severe" categories. However, every form of sexual harassment was experienced by a substantial percentage of respondents and narrators.

As one might expect, the impact of harassment was indicated to be greater on the individual than on the group within which she worked (Charts 3 and 4). However, it should be noted that these evaluations were obtained from the victims and were, undoubtedly, affected by subjective reactions often compounded by isolation. These findings are, therefore, highly misleading except in terms of understanding the impact of harassment on victims. Given a broader definition of "impact", long-term effects of harassment have been found to produce an organization in which general standards of morale are quite low. Assuming this condition to be a widespread phenomenon might also explain why harassment of the individual is shown to have so little effect on others, just as in combat many soldiers become numbed to the impact of death surrounding them as a psychological defense to an unacceptable condition. While the combat comparison may seem extreme at first, its appropriateness is indicated by the extent to which narrators consider the impact of such experiences to be emotional and psychological.

According to Chart 5, victims reported adverse emotional or physical effects ranging from 82 percent for victims of actual or attempted rape or sexual assault, to 37 percent for victims of severe sexual harassment, and 21 percent for victims of less severe sexual harassment. In addition, substantial adverse impacts were also reported by victims on their

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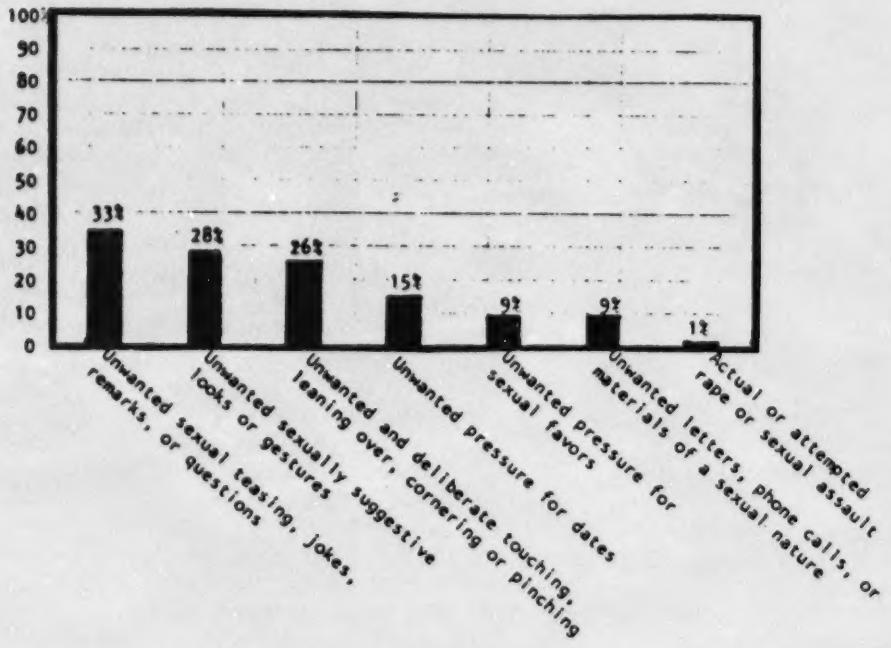
*/ Corresponding numbers from the Merit Systems study - preliminary report - from which the following charts were taken, are indicated in the Table of Contents (above).

1.
HAVE YOU RECEIVED ANY OF THE FOLLOWING UNINVITED SEXUAL ATTENTION DURING THE LAST 24 MONTHS (MAY, 1978 TO MAY, 1980) FROM SOMEONE WHERE YOU WORK IN THE FEDERAL GOVERNMENT? (WOMEN EMPLOYEES ONLY: PERCENT INDICATING ONCE OR MORE)



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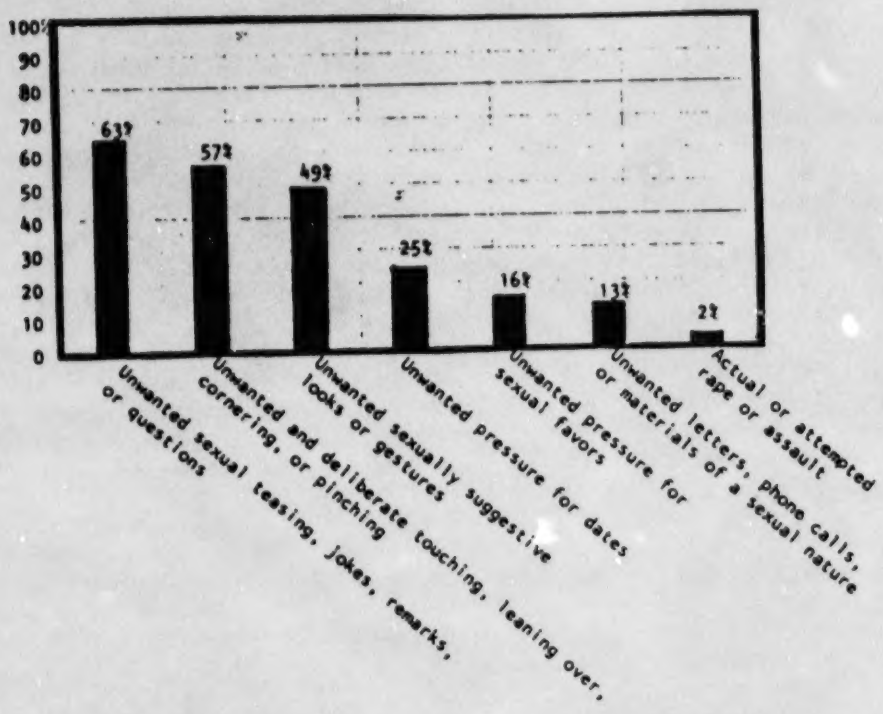
2.
DURING THE EXPERIENCE YOU DESCRIBE HERE, WHICH OF THE FOLLOWING HAPPENED TO YOU? (WOMEN NARRATORS ONLY: PER CENT WHO CATEGORIZED THEIR CRITICAL INCIDENT AS FOLLOWS)



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feelings, time and attendance at work, ability to work with others on the job, the quantity of their work, and the quality of their work. Victim studies indicate that these effects are often compounded by retaliation resulting from formal complaint. While Chart 5 indicates the immediate impact of harassment on victims, it should be noted here that respondents were not asked in this question about the impact on their careers.

While there is a certain amount of double counting in the identities of sexual harassers represented in Chart 6, the percentages indicate supervisors are involved in substantial numbers of such incidents. (If the categories "subordinate" and "unknown" are subtracted from "co-workers or other employee" the remaining amount over 100 when this category is added to supervisor is probably due to double counting supervisors who are also co-workers.) Out of the total number of incidents of actual or attempted rape or sexual assault during the 24-month period extrapolated for the total Federal work force (694,000 women), as many as 119,790 of the 294,000 estimated to have been harassed were victimized by their own or an other high level supervisor. Slightly less than half of the victims of severe sexual harassment or approximately 88,000 were harassed by their supervisors, while approximately one third who reported incidents of less severe sexual harassment named their supervisors as responsible. Significantly, the involvement of supervisors is less in less severe categories of sexual harassment, both in terms of percentages compared with non-supervisory employees and in terms of proportionate numbers by general level of severity.

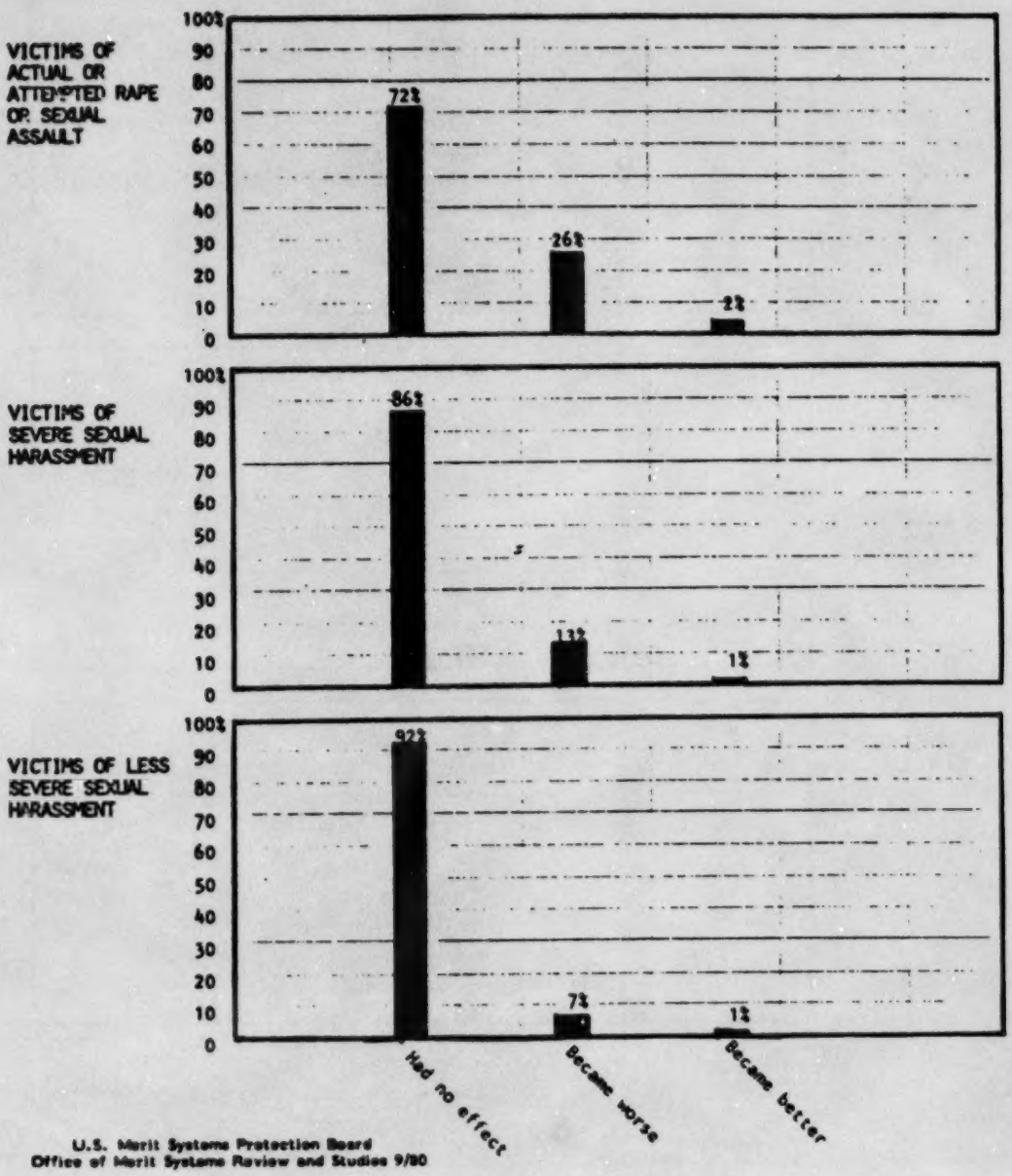
It is significant that supervisors were most actively involved in the most severe categories. The impact of such behavior must be greater on the victim if it comes from those who are charged with maintaing standards of employment and to whom one would ordinarily look for protection and guidance in such matters.

The impact must also be great on implementation of general policies prohibiting sexual harassment in employment and, no doubt, explains the retaliation noted above. The extent of the impact is also shown in the survey, as will be discussed later in terms of how victims dealt with sexual harassment and their opinions about what should be done to deal with the problem more effectively.

The most immediate impact of sexual harassment is seen in terms of the expectations of the victims and what actually happened by way of punishment and reward. On this matter The Merit Systems report concluded:

> The actual or attempted rape/assault group was more inclined to foresee penalties for <u>not</u> going along, and (to a lesser extent) work-related rewards if they <u>did</u> go along. In contrast, a majority of the "severe" and "less severe" harassment groups foresaw no

3.
HOW DID THE UNWANTED SEXUAL ATTENTION AFFECT OTHERS IN YOUR IMMEDIATE WORK GROUP? (WOMEN NARRATORS ONLY: PERCENT WHO INDICATED THE MORALE OF THEIR IMMEDIATE WORK GROUP CHANGED AS FOLLOWS)



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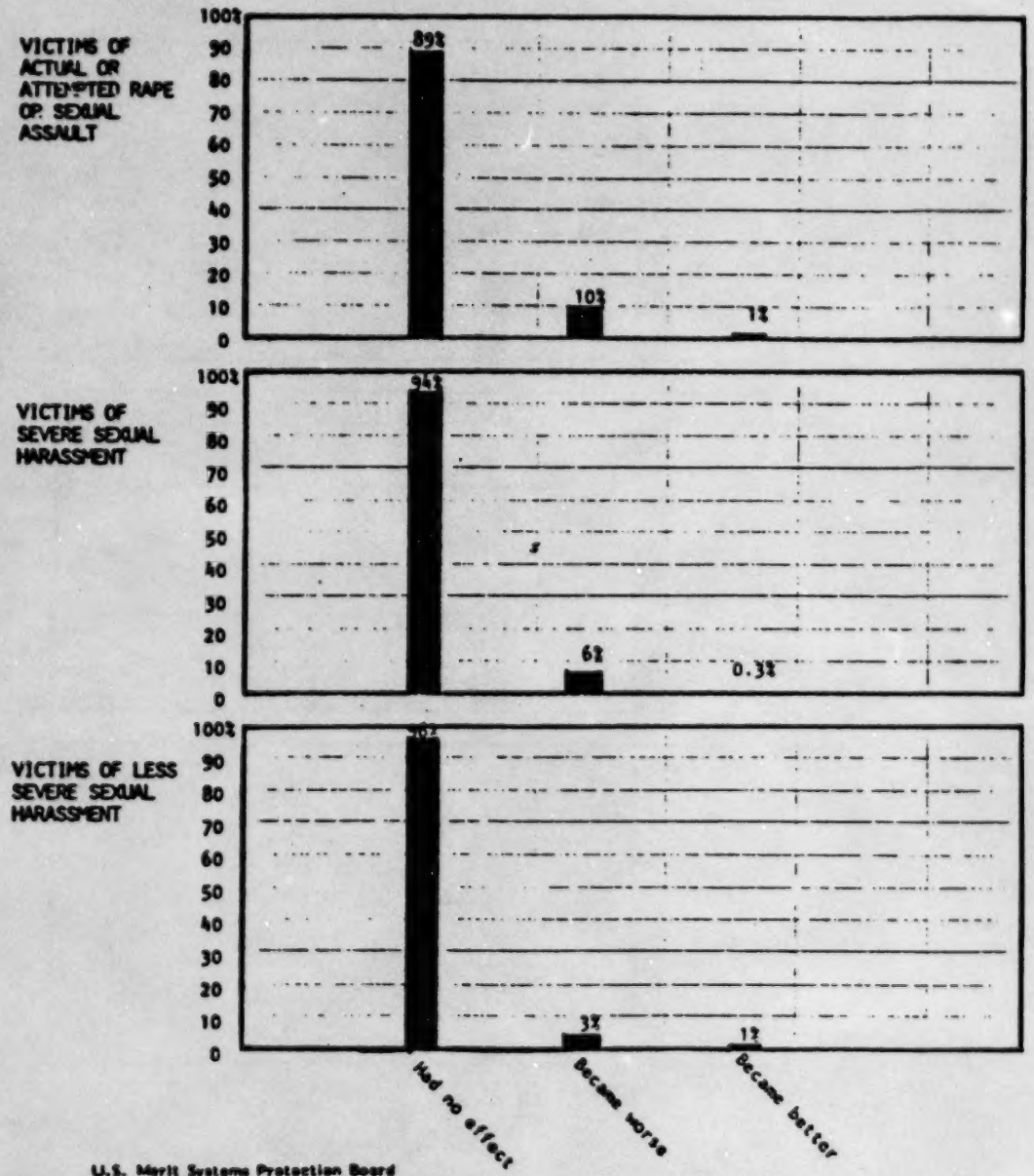
4.
HOW DID THE UNWANTED SEXUAL ATTENTION AFFECT OTHERS IN YOUR IMMEDIATE WORK GROUP, THAT IS, THE PEOPLE YOU WORKED WITH ON A DAY-TO-DAY BASIS? (WOMEN NARRATORS ONLY: PERCENT WHO INDICATED THE PRODUCTIVITY OF THEIR IMMEDIATE WORK GROUP CHANGED AS FOLLOWS)



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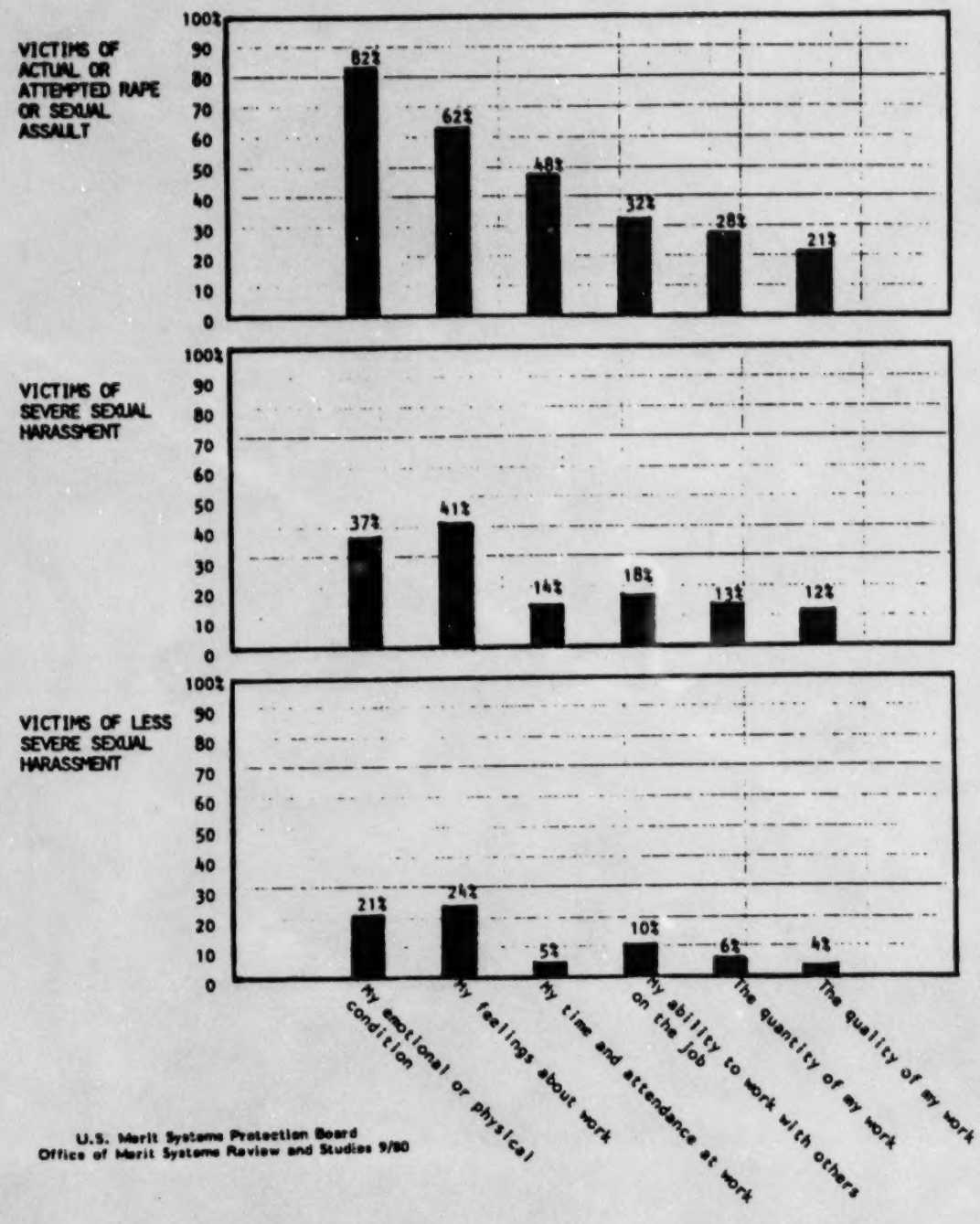
5.
HOW DID THE UNWANTED SEXUAL ATTENTION AFFECT YOU? (WOMEN NARRATORS ONLY: PERCENT WHO INDICATED THESE ASPECTS OF THEIR LIVES "BECAME WORSE")



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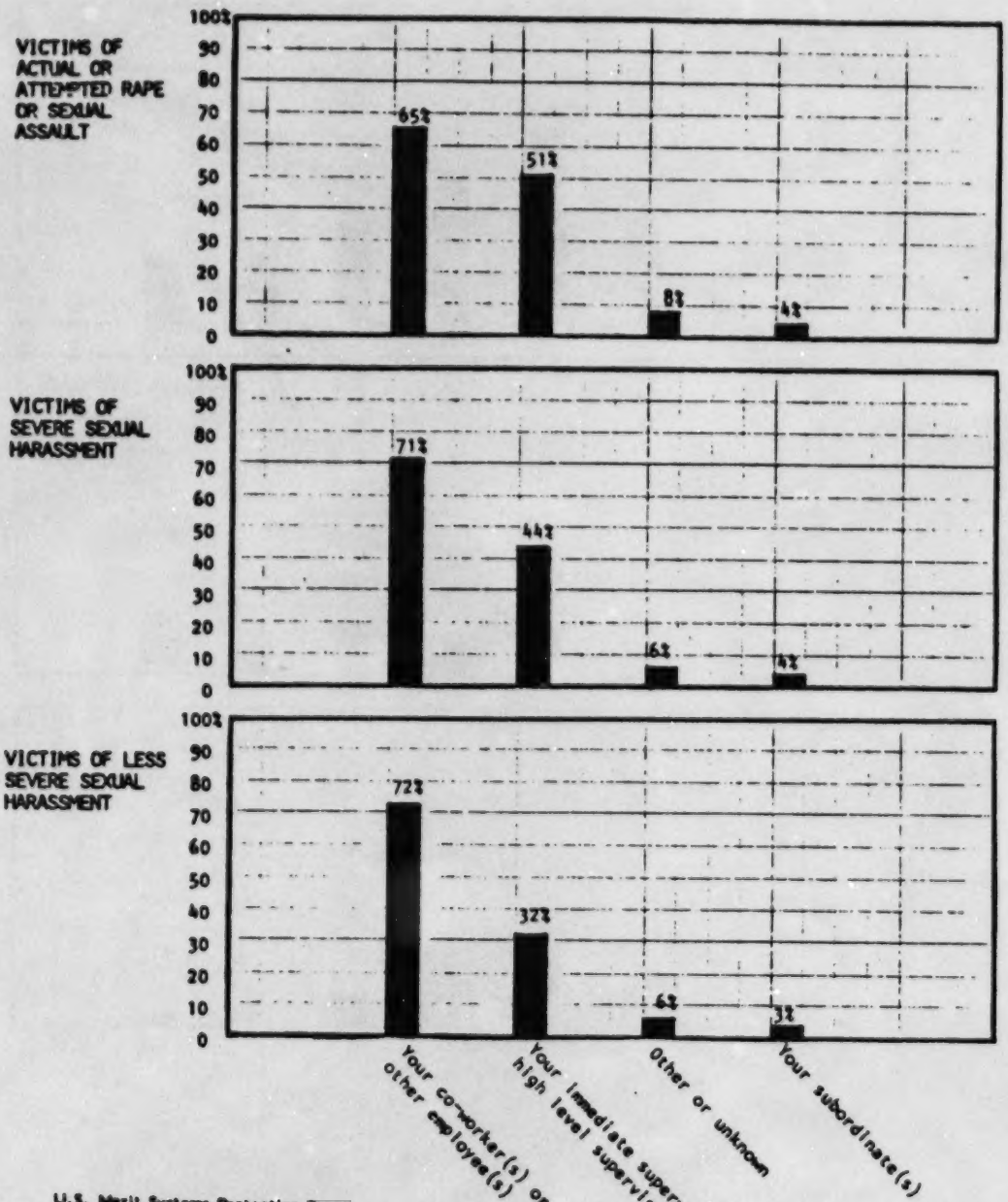
6.
WHO WAS THE PERSON(S) WHO SEXUALLY BOTHERED YOU? (WOMEN NARRATORS ONLY: PERCENT WHO NAMED THE FOLLOWING PARTY)



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specific consequence of going along or not going along. These women victims apparently viewed themselves as trapped in an unpleasant situation, with no particular carrots or sticks involved. (It is probable that most of these victims were harassed by coworkers, rather than immediate or higher-level supervisors.) For those "severe" and "less severe" harassment women victims who did foresee some positive consequence for going along, the expectation that the "person(s) would become more pleasant" was cited more frequently than any expectation of financial or career betterment. 49/

On the face of it Chart 7 seems to contain some contradictions. An obvious one is suggested by the high percentages given for the category, "I did not think anything would happen." In the case of rape or sexual assault, it seems to indicate either a high incidence of attempts that did not succeed or a high degree of passive compliance. The very high percentages in the case of severe and less severe sexual harassment also suggests a rather general condition in which the victims have little control. That is, it suggests that harassment is a condition of employment; whether victims go along with it or not has relatively less to do with their careers than does their willingness to work in an environment which includes a general and constant level of sexual harassment or the possibility of it. Comparing these percentages with those of Chart 6, suggests a relationship between percentages for supervisory related threats, the view, "I did not think anything would happen," and the finding that, in fact, "no changes happened in my work situation." That is, if the results were presented separately for harassment by supervisory employees only, the percentages for the latter categories would be smaller and percentages for supervisory related threats and consequences would be higher. As it is, the results shown indicate that overt sexual harassment by supervisory employees is not idly enaged in but is fairly systematic and understood. It is also useful to consider, with reference to Chart 9, that instances of unwanted consequences constitute a progression for most victims and that, while seemingly less frequent for victims in general, increase in frequency for them relative to the seriousness of the victimization. Though not shown here, EEOC studies among others show that these consequences become almost a certainty for victims who file complaints.

What Interviews with Victims Sho[w]

As was discussed earlier, women employees who believe themselves to have been victims of sexual harassment, as in the case of students interviewed in the study of the National Advisory Council on Women's Educational Programs, both "described a wider range of incidents as 'sexual harassment,'" and "reflected great variety in describing what constituted 'unacceptable' behavior and in providing definitions for sexual harassment." This is an important finding itself because it reflects the depth of the problem beyond what the courts have found actionable so far and even the scope of the problem as indicated by the results of the Merit Systems survey.

Much more than the survey results, victim interviews indicate a problem of apparently large and labyrinthine proportions. They indicate that much of the problem may be hidden by ambiguities of social norms and fear of embarassment and reprisal. It is similar in this respect to other social problems regarding the status of women and with respect to a common element of intimidation, to family violence, rape, and incest. Each of these behavioral phenomena have been influenced to some extent by a culture of silence: misunderstanding and repression that tends in practice to reward the oppressor and punish the oppressed.

As the problem itself has remained hidden, so have the consequences. While rape is admittedly more serious than ogling, the effect of the latter may be as great to a given individual in psychological and economic terms if it leads ultimately and, as is often the case, after an extended period, to loss of social and self esteem and job.

Jill Goodman, writing in the Civil Liberties Review, of the American Civil Liberties Union, has stated:

> Sexual harassment, whether on the street or in the office, is an invasion of privacy. Attempting to withstand that pressure can have devastating effects on emotional and physical health. Women commonly report such symptoms as colitis, episodes of vomiting, and severe depression. And the aspirations of women who have been so profoundly affected by discrimination inevitably suffer. 50/

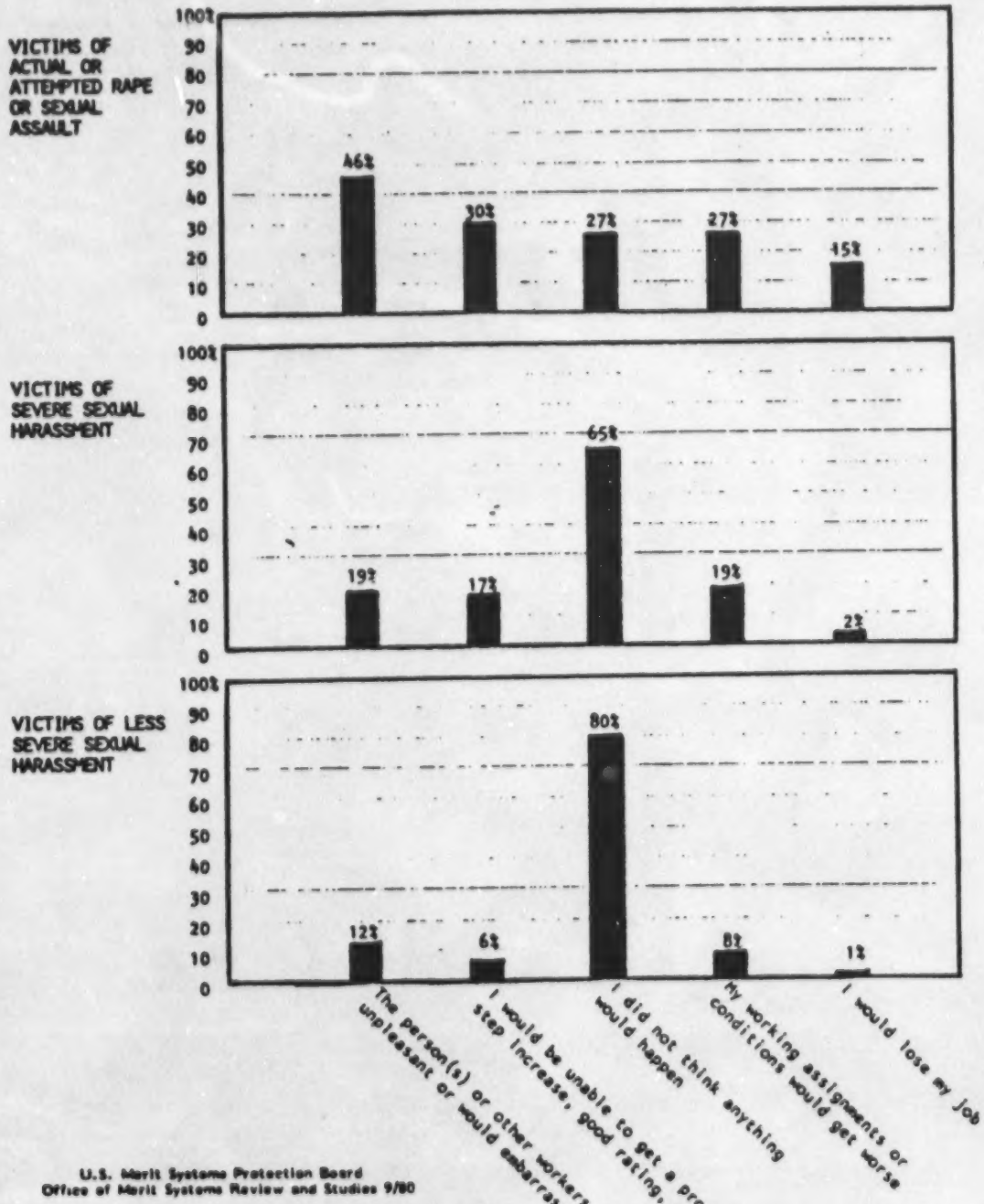
Rowe, in her study, The Saturn's Rings Phenomenon, enumerates the extensive minor harassment of working women. She describes the damage for these "micro-inequities," based on interview sources:

> In part they are a kind of a pain which cannot be predicted very well in any functional sense .... As an intermittent, unpredictable reinforcement, however, they have peculiar power as a negative learning tool; Unpredictable, intermittent reinforcement being among the more powerful types of reinforcement .... They take up time. Sorting out what is happening to one, and dealing with one's pain and anger takes time .... They seem petty .... The perceived lack of appropriate ways to redress helps perpetuate micro-aggressions. 51/

In a sort of ripple effect of consequences, women who have complained of being harassed frequently become the subject of retaliatory acts when they seek redress. They usually experience additional problems should their appeals fail; in effect they become subjected to harassment by the employment, administrative, and judicial systems to which they necessarily look for help.

As the Merit Systems study indicates, a large proportion of individuals in government who have successfully pursued complaints in the courts or with in their own organization, later transfer to other units. Cases on record show that this is usually a protracted and, in the end, person-

7.
DID YOU THINK THAT ANY OF THE FOLLOWING WOULD HAPPEN TO YOU IF DID NOT GO ALONG WITH THE UNWANTED SEXUAL ATTENTION? (WOMEN NATTATORS ONLY: PERCENT WHO THOUGHT THESE NEGATIVE THINGS WOULD HAPPEN TO THEM)



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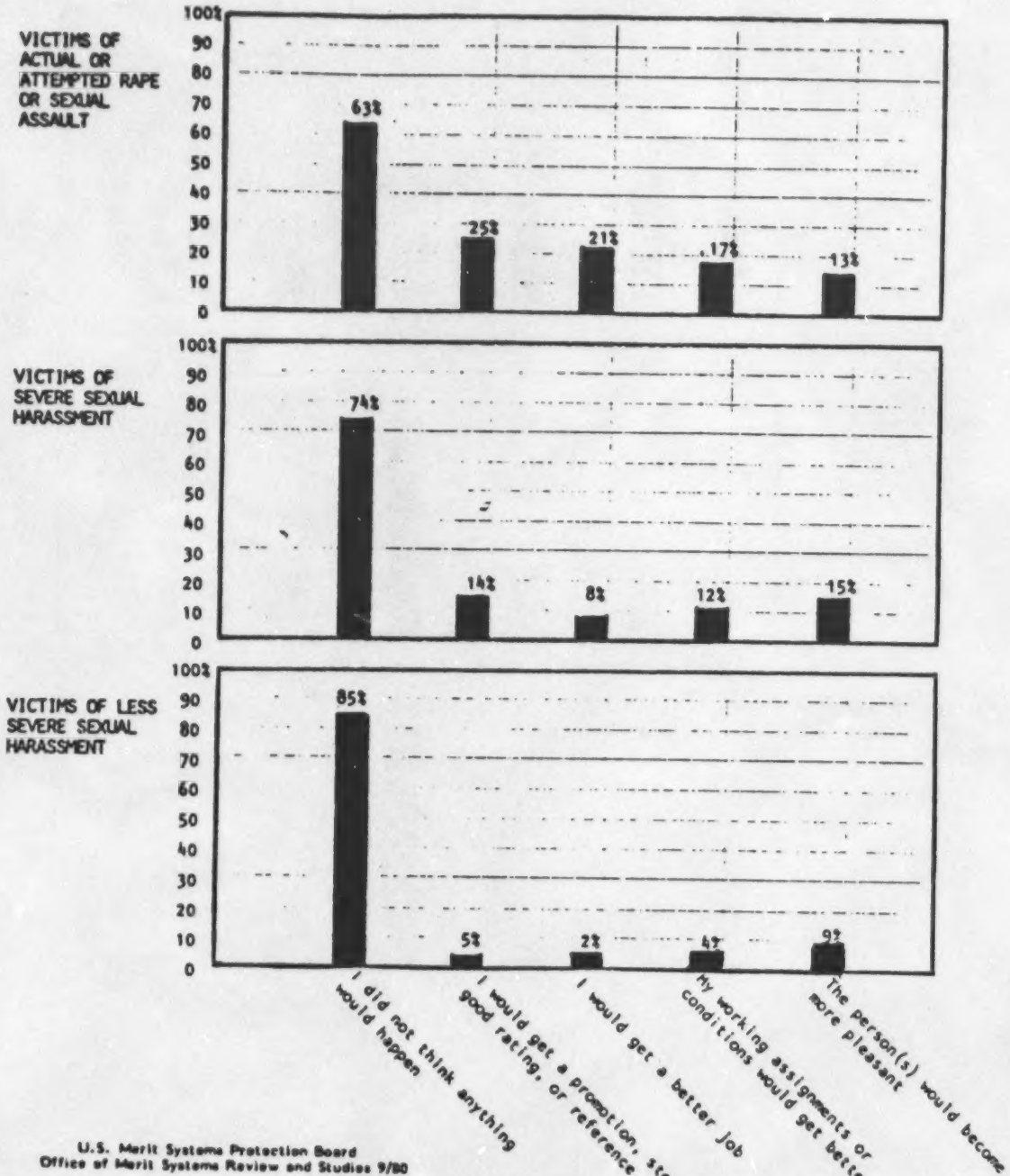
8.
DID YOU THINK THAT ANY OF THE FOLLOWING WOULD HAPPEN IF YOU WENT ALONG WITH THE UNWANTED SEXUAL ATTENTION? (WOMEN NARRATORS ONLY: PERCENT WHO THOUGHT THESE POSITIVE THINGS WOULD HAPPEN TO THEM)



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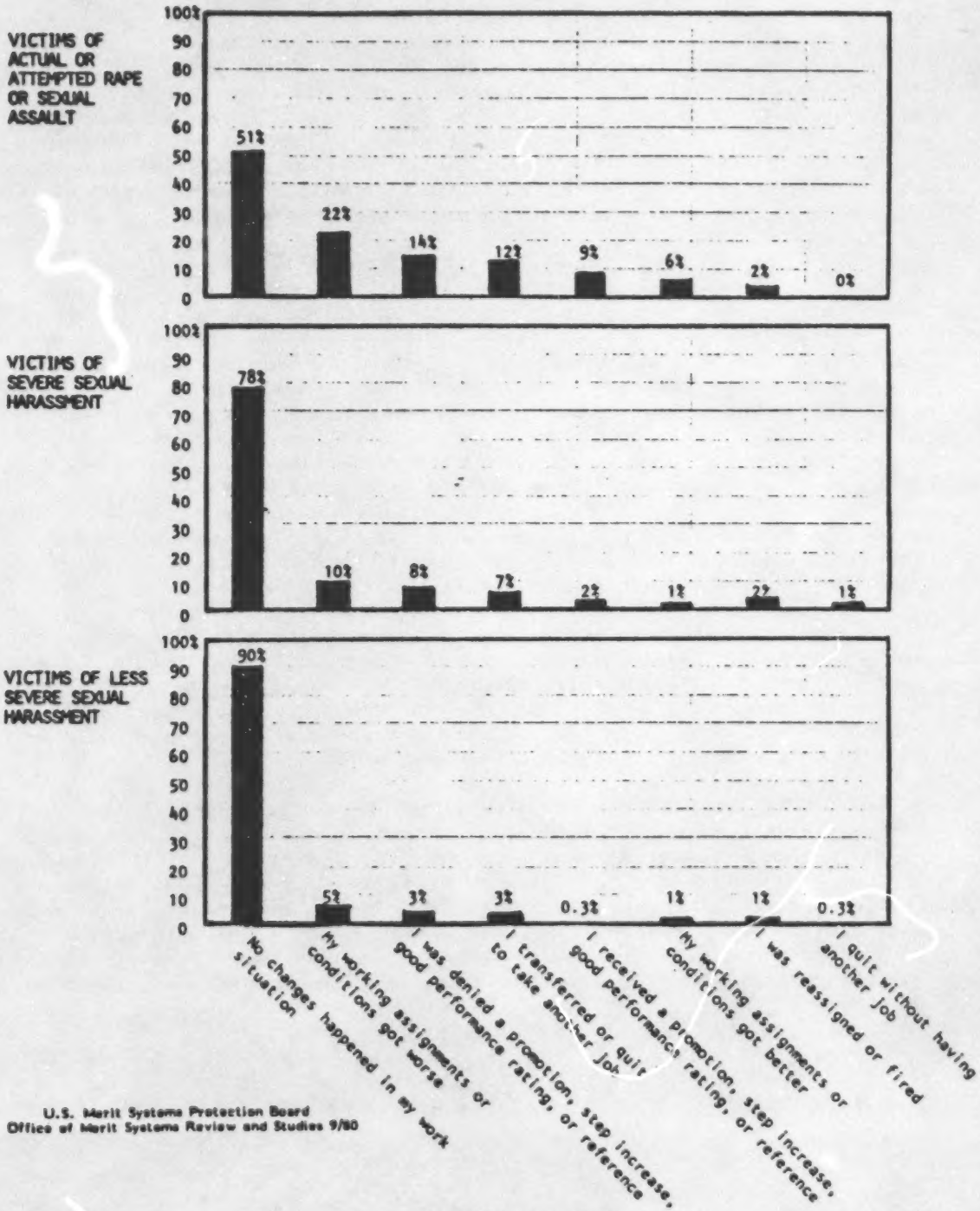
9.
DID ANY OF THE FOLLOWING CHANGES HAPPEN IN YOUR WORK SITUATION AS A RESULT OF THIS UNWANTED SEXUAL ATTENTION? (WOMEN NARRATORS ONLY: PERCENT WHO INDICATED THESE CHANGES ACTUALLY OCCURRED)



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ally unsatisfactory procedure. Ms. Smith (whose case was discussed above in Chapter 2) finally was forced, at the recommendation of her doctor, to work half-time in order to recover from her seven-year experience. In another case, Mary Ryan resigned her job the day that she won her suit against the Federal Deposit Insurance Corporation because, she said, she could no longer endure the continual harassment. Irene Bowman, who won the first major class action suit against the Department of Justice, transferred to another agency "due to the inability of the court to uphold its order instructing the Department of Justice to halt the harassment" she and other employees had been experiencing. Rosalind Marimont, who won the first sexual harassment case against the National Institutes of Health, resigned her job "under duress and due to failing health." One woman who had filed a sex discrimination case commented afterwards: "filing a complaint is a life-shortening experience."

A Handbook for EEO Complainants: Making Waves Without Drowning, published by the Federal Employed Women's Legal and Education Fund, underscores the problem of retaliation against women EEO complainants. Among the recorded instances of retaliation, the most notable are acts directed to damaging the complainants career by bringing about resignation, demotion, transfer or firing. Among other measures usually taken by employers, complainants report being refused promotion and assigned lower level or undesirable tasks, given unreasonable deadlines under poor working conditions, denied administrative support and the like. Consideration for priviledges or "perquisites" requiring administrative approval such as educational benefits and the like are normally not granted to complainants. An atmosphere of oppression is created by these acts in which the complainant is characterized as a "complainer" comprising a general effort by supervisory and administrative staff in which her colleagues are urged to join. Threats and other personal attacks have also been found to be part of the experience of being a complainant. In this category of behavior the suggestion generally becomes increasingly accepted that the employee is mentally disturbed. Given the length of time required for processing an EEO complaint and the stresses in the situation which tend to build over time, psychological breakdown might be considered a more or less self-fulfilling prophecy.

There is an equally serious impact on the complainant's fellow employees and the organization at large, however, which must be recognized as well. Where there is escalation of acts of retaliation, the atmosphere of oppression and helplessness tends to increase. Job dissatisfaction becomes general and this is observable in employee turnover and other indicators. This may partly explain why only 10 percent of of respondents to the Merit Systems survey answered yes to the question, would formal remedies "be effective in helping" victims of sexual harassment.

Conclusions

The extent and seriousness of harassment is only now beginning to be understood. The evolution of remedies has proceeded on the basis on individual complaint rather than general understanding of the problem. The literature search conducted for this project found little systematic data on the subject. In this sense the Merit Systems study, limited though it may be by its objectives simply to improve government agency management systems and by the scope of its definition, is the landmark effort so far. A literature search and a search for statistical studies by the Office of Merit Systems Review and Studies found that few studies had been made on the subject of sexual harassment in employment and that while the surveys which they examined all tended to indicate that sexual harassment in one form or another is a widespread phenomenon, "each survey contained one or more problems in sampling technique or overall survey design." 52/

What is indicated by those surveys, limited or flawed though they may be, and what is confirmed by studies of individual cases, though seldom sanctioned as actionable by the courts, goes further than the observation made above that the extent and seriousness of harassment is only beginning to be understood. In fact, what is shown by the work so far is the basis for understanding the nature and significance of harassment which is only now beginning to emerge from the limited studies, court cases and the work of the EEOC and advocacy organizations.

ATTEMPTS TO DEAL WITH HARASSMENT

The frustrations and difficulties of dealing with harassment using formal remedies on a case by case basis have been described in some detail above. Whatever the merits of their complaints these individuals have brought about public awareness concerning a problem which may have been so common as not to be recognized. In the end few of these complainants were exonerated or promoted by the organizations they did battle with. For almost all of them their complaints led inevitably to their resignation. Their final solution was what most others would have accepted in the first place, thereby hoping not to disrupt their career or jeopardize their job.

The Merit Systems study reflects this view to a great extent in questions intended to show how victims attempt to cope with sexual harassment and with what results. While 42 percent of respondents reported that they had been victimized during the two-year period of the study, very few chose formal action as a remedy. Neither did their supervisors, however. While Chart 10 shows that over 50 percent of the victims thought that reporting sexual harassment behavior to supervisor or other officials was an action which "made things better," making a joke of the behavior, asking or telling the person(s) to stop, or avoiding the person(s) also "made things better." Incredibly, in the case of actual or attempted rape or sexual assault, an area of potentially criminal offense, 52 percent thought that making a joke of the behavior "made things better" compared with only 57 percent who found reporting behavior to supervisor or other officials to be effective.

Whether their reluctance to take formal action is due to ignorance or fear is not entirely apparent from the preliminary report of the survey. While formal complaint procedures appear to be available to all employees at this time they may be effectively denied to them by administrative or other manipulation in some instances. It is clear from the survey that the least troublesome responses to even the most extreme forms of harassment are the first chosen. The responses of victims also suggest that the effectiveness of informal measures is not entirely accepted. This is shown by results when, short of formal complaint, victims reported the behavior to the supervisor or other officials. This action was found by victims to be a less effective way "to make others stop bothering them sexually" than simply asking or telling the person(s) to stop. This was found to be even more the case for victims of the most severe forms of harassment than for victims of less severe forms.

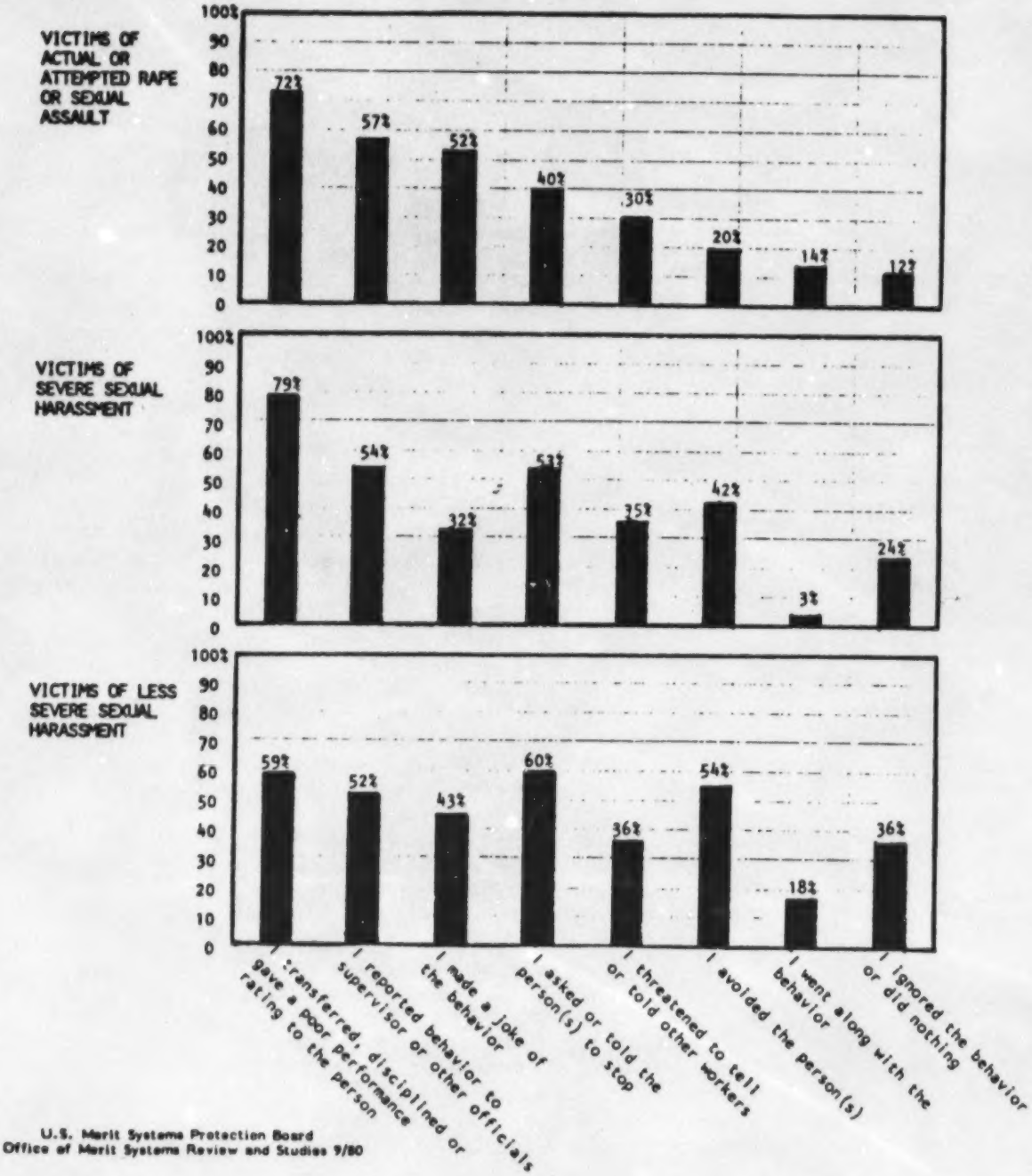
Charts 10 and 11 show significant discrepancies between methods narrators report using and what victims recommend or believe should be effective. Thus, in the case of asking or telling the person(s) to stop, reporting the behavior to supervisor or other officials, ignoring the behavior, avoiding the person(s), and threatening to tell or telling other workers, the values are decidedly reversed. That is, while victims recommended asking or telling the person(s) to stop or reporting the behavior to the supervisor or other officials, in reality, much smaller

percentages found such actions to have been effective. It is also significant that the values for these options are reversed in most cases. That is, while reporting behavior is recommended to be used most in less severe cases than for rape/assault, it was found to be relatively less effective in practice. Perhaps significantly, "filing a formal complaint," while recommended by over half the victims of severe and less severe harassment (although evaluated separately), was not reported in Chart 10 as an action which made things better.

In many instances when victims took formal (institutional) action, management responded by either doing nothing or by becoming hostile to the complainant. Often the victim did not know whether management did anything about the complaint. If, however, management "found my charge to be true" and "took action against the person who bothered me," such action was found to have "corrected the damage done to me" in relatively few instances compared with indications of the reliance by the victims on management. While management took action in 74 percent of the cases of actual or attempted rape or sexual assault reported to them (Chart 12), only 17 percent of the complainants were satisfied that such action "corrected the damage done to me." This compares with 20 percent for victims of severe sexual harassment. Incredibly, while management took action in 31 percent of the cases of less severe sexual harassment, not a single complainant indicated satisfaction that such action "corrected the damage."

Clearly, these findings indicate that there is much that needs to be done by management to improve its effectiveness in dealing with sexual harassment. Chart 13 indicates that in the most severe and less severe categories, victims found that "outside contact (lawyer, civil rights group, Congress, other agency, etc)" was more effective than "my supervisor(s) or other officials." Chart 14 indicates that filing a discrimination complaint or lawsuit was found to be relatively more effective way to "make things better" by victims of less severe sexual harassment. What these results might suggest is that management may focus most of its efforts on clear cases of severe sexual harassment, working cooperatively with outside agencies in cases of actual or attempted rape or sexual assault (and thus relatively less effective a source of assistance) but ignoring or opposing instances of less severe sexual harassment. However, as the report states, "the uniformly high level of response (shown in Chart 15) appears to indicate that women victims think that there is much that management can do to combat sexual harassment.... Relatively few women victims indicated that there is little that management can do ..." In answer to the question, "Which of the following do you think are the most effective actions for an organization's management to take regarding sexual harassment?", the three most often recommended by all categories of victims were: "conduct swift and thorough investigations of complaints of sexual harassment, enforce penalties against those who sexually bother others, and establish and publicize policies which prohibit sexual harassment." Other categories which were almost as strongly endorsed were, "publicize the availability of formal complaint channels, provide training for managers and EEO officials on their responsibilities for decreasing sexual harassment, and enforce penalties against managers who knowingly allow this behavior to continue."

10.
FOR EACH ACTION THAT YOU TOOK, WHAT EFFECT DID IT HAVE? (WOMEN NARRATORS ONLY: PERCENT WHO INDICATED THIS ACTION "MADE THINGS BETTER")



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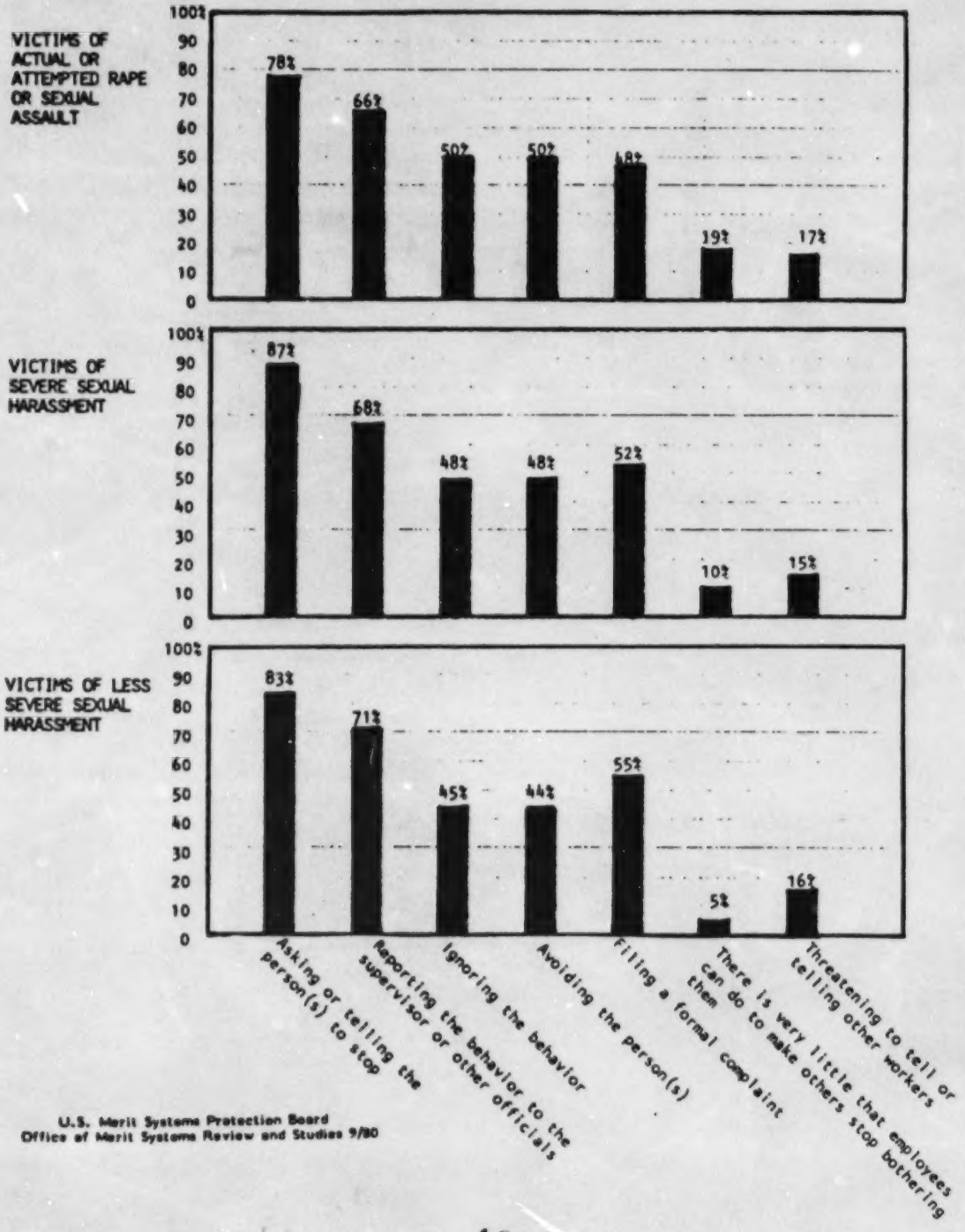
11.
IN MOST CASES, WHICH OF THE FOLLOWING DO YOU THINK ARE THE MOST EFFECTIVE ACTIONS FOR EMPLOYEES TO TAKE TO MAKE OTHERS STOP BOTHERING THEM SEXUALLY? (WOMEN VICTIMS ONLY: PERCENT RECOMMENDING EACH ACTION)



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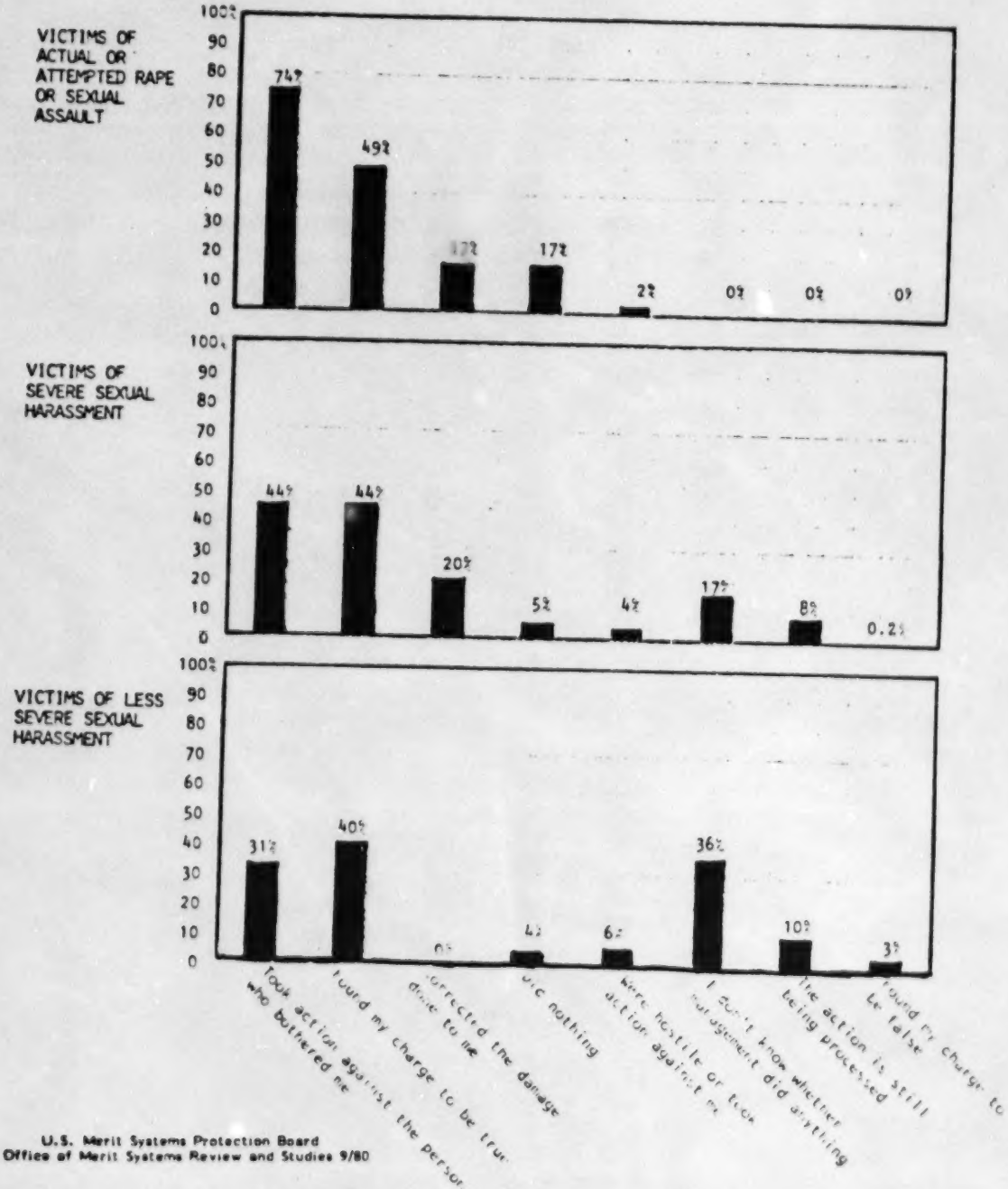
12.
HOW DID YOUR ORGANIZATION'S MANAGEMENT RESPOND TO THE (FORMAL) ACTION YOU TOOK? (WOMEN NARRATORS WHO TOOK FORMAL [INSTITUTIONAL] ACTION: PERCENT WHO INDICATED THAT MANAGEMENT RESPONDED AS FOLLOWS)



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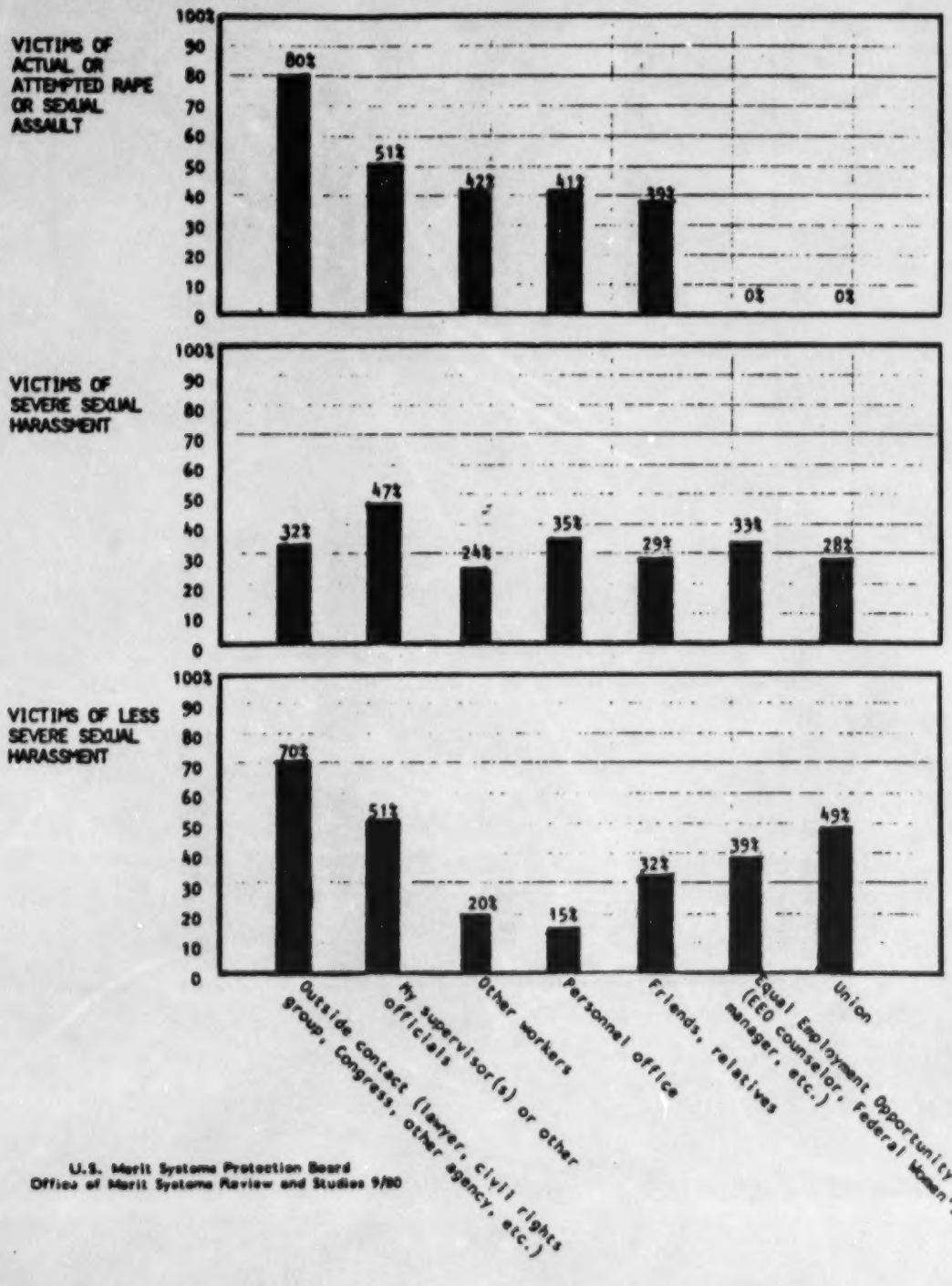
13.
FOR EACH INDIVIDUAL GROUP THAT YOU TALKED WITH, DID IT MAKE A DIFFERENCE? (WOMEN NARRATORS ONLY: PERCENT WHO INDICATED THAT TALKING TO THIS PARTY "MADE THINGS BETTER")



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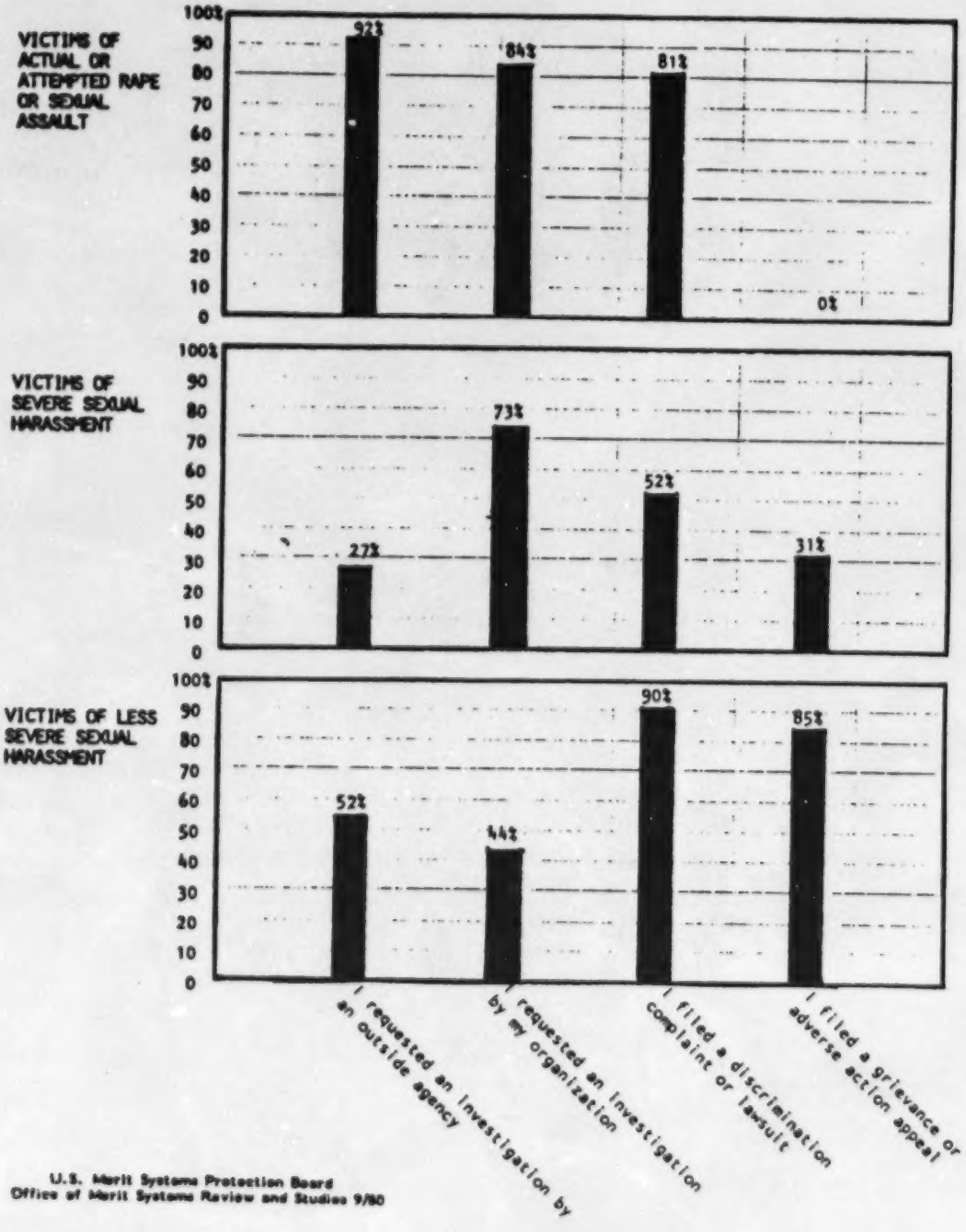
14.
FOR EACH ACTION THAT YOU TOOK, DID IT MAKE A DIFFERENCE? (WOMEN NARRATORS WHO TOOK FORMAL [INSTITUTIONAL] ACTION: PERCENT WHO INDICATED THIS ACTION "MADE THINGS BETTER")



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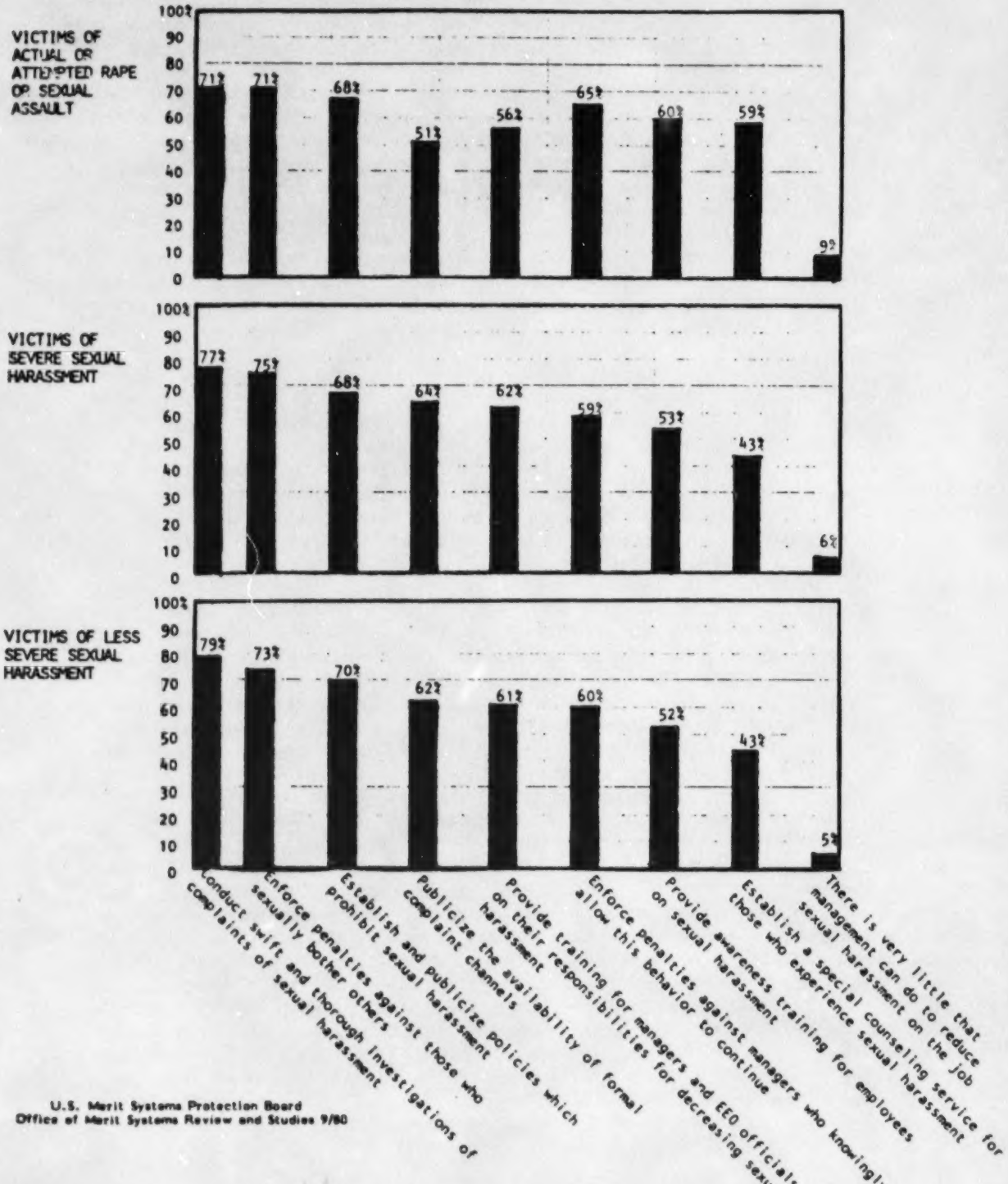
15.
WHICH OF THE FOLLOWING DO YOU THINK ARE THE MOST EFFECTIVE ACTIONS FOR AN ORGANIZATION'S MANAGEMENT TO TAKE REGARDING SEXUAL HARASSMENT? (WOMEN VICTIMS ONLY: PERCENT RECOMMENDING EACH ACTION)


VICTIMS OF ACTUAL OR ATTEMPTED RAPE OR SEXUAL ASSAULT
71% 71% 68% 51% 56% 65% 60% 59% 9%
VICTIMS OF SEVERE SEXUAL HARASSMENT
77% 75% 68% 64% 62% 59% 53% 43% 6%
VICTIMS OF LESS SEVERE SEXUAL HARASSMENT
79% 73% 70% 62% 61% 60% 52% 43% 5%
100% 90 80 70 60 50 40 30 20 10 0
Conduct swift and thorough investigations of complaints of sexual harassment
Enforce penalties against those who sexually bother others
Establish and publicize policies which prohibit sexual harassment
Publicize the availability of formal complaint channels
Provide training for managers and EEO officials on their responsibilities for decreasing sexual harassment
Enforce penalties against managers who knowingly allow this behavior to continue
Provide awareness training for employees on sexual harassment
Establish a special counseling service for those who experience sexual harassment
There is very little that management can do to reduce sexual harassment on the job

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CONCLUSIONS

Harassment of women in employment, like similar forms of hostile behavior which have become the subject of the study and remedies in the recent past -- rape and spouse abuse -- has been found to be based primarily on power relationships. Data from studies reviewed here further substantiate that view. While the limited data available so far does not adequately describe the full extent of sexist or subtle forms of sex discrimination, it does provide a clearer picture of the nature and extent of sexual harassment. The Merit Systems survey data as well as anecdotal information from victim interviews strongly suggest a hierarchy of types of incidents from sexist and less severe sexual harassment, which is the most widespread and general, to the more drastic forms of antisocial sexual behavior. The Merit Systems study indicates this very clearly: "The frequency of the various forms of harassment is roughly in reverse order of severity, e.g., the most frequently occurring behavior (sexual remarks) is considered to be one of the less severe forms of harassment. 53/

This hierarchy of increasingly extreme behavior from the almost incidental and, seemingly, harmless and irrelevant to the most physically and psychologically damaging suggests an underlying system and policy. Indeed, the courts have found sex discrimination, like racial and ethnic discrimination, to be illegal based on constitutional and statutory guarantees of equality. However, as was pointed out earlier, while both official and unofficial actions have been recognized in the case of racial and ethnic discrimination, in the case of harassment and, until recently, only instances involving official employer policies were recognized by the courts. Yet the available studies of the full range of harassment suggest that, although rape/abuse may be more physically damaging in the short run, the long run damage of apparently less consequential forms may be greater. Psychological, emotional, and career damage from the most common forms of harassment are usually far greater than the results of physical abuse especially where there are secondary and other stages of effects resulting from filing a complaint. The Merit Systems survey results themselves call into question as probably misleading the designations of severity used in the preliminary report.

The Merit Systems data suggest a widespread and established pattern based roughly on administrative hierarchy in which sex discrimination, effectively, is directed to confining women to a prescribed socio-economic status. In this aspect, sexual harassment is an instrument of power and discrimination equally insidious and universal as the historically recognized discriminatory efforts regarding racial, ethnic, and religious social and economic status. How incidents of sexual harassment become formed into a hierarchical system of sex discrimination is thoroughly described by the survey data and further augmented by anecdotal studies of women employees who have been victimized. What seems most sensational, however, is the confirmation of this view which comes from an entirely different sector, the report on sexual harassment in post secondary educational institutions, by the National Advisory Council on Women's Educational Programs cited earlier. In evaluating the findings of this study, the report states:

There is considerable speculation and disagreement about who harasses, who is harassed or suffers from harassment, and why ... a number of hypotheses were suggested by the patterns:

1) Allegations of harassment against school officials indicated that the behavior is often repetitive -- that the complainant is likely to be one of several persons victimized by the same initiator. The appearance of this pattern, particularly where the complainants are unknown to one another, may be a strong indication that allegations are well founded.

2) The faculty involved in the more serious cases seem to be primarily "gatekeepers" — persons with an unusual degree of influence over the academic careers of the victims. Department heads, graduate advisors, and others with a central role in the victim's area of study were often cited.

3) Male faculty in traditionally male dominated fields are the most likely initiators of generalized anti-women remarks of a non-salacious type, but hold no special claim to the more suggestive forms of offensive remarks and behavior described by respondents in category one.

4) Younger faculty members who relate to students as "a leader among peers" may underestimate the advantage (and power) they have over students. This may lead in turn to unwitting, but still very destructive misuses of their positions in an appeal for intimacy. 54/

Clearly, the pattern of sexual harassment and its basis on power relationships is remarkably similar in the conclusions of this study of academic institutions, derived though it is from the results of an informal letter request for descriptive information (coincidentally during the same time period), as in the structured random sample survey which was designed to produce a highly reliable and accurate data base. 55/ The data from the Merit Systems survey not only confirm the validity of these hypotheses in the same ordering of severity of incidents, they also give a more comprehensive and structured description of the nature and extent of the problem. The four hypotheses above fit very well what can be understood from the Merit Systems study about the hierarchy -- its consequences and how it functions.

Out of the extensive data of the Merit Systems survey a profile of the female victim emerges, which is further developed by victim interviews. Although sexual harassment was reported by women in all grades and salary levels, it appears to be greater in entry situations -- in all grades. The incidence was highest among women trainees, especially those with college degrees (including advanced degrees). The survey found that:

- o Women ages 16 to 24 were more than twice as likely to experience some form of sexual harassment as women ages 45 and above.

- o The incidence of "severe" sexual harassment is substantially higher for women under 34, with less severe incidents experienced by the younger age group.

- o Nearly three out of five women ages 16 to 24 reported some form of sexual harassment during the 24-month period, compared with one in five for women over 55. 56/

The survey suggests strongly that it is the ambitious college educated woman, perhaps attempting to break the traditional confinement to lower level occupations and grade designations who is most susceptible to harassment. At the lower clerical levels which correspond with lower levels of educational attainment, harassment may be more general and less drastic, just as it is also the case for women 45 and above. The theory has been put forward that harassment of women by men employees has more to do with the protection of traditionally male prerogatives and financial and occupational status than with sexual compulsions. This seems to be the theoretical construct which is most supported by the data derived from the Merit survey.

A pattern of behavior is indicated involving complicity by male employees in a determined attempt to deprive female employees who are otherwise qualified by educational attainment from access to occupations and grade levels equal to men. Such complicity is indicated by the strong involvement of immediate and higher level supervisors and, when one considers also the victim interview data describing retaliation, higher management as well.

While the Merit Systems study was not specifically directed to the study of harassers, it did ask narrators (victims) some questions about the characteristics of those by whom they had been harassed. In most cases, harassers were described as being older than the victim, male, and of the same ethnic and racial background. More often than not, they were supervisory co-worker(s), immediate supervisor(s) or higher-level supervisor(s) -- especially in incidents of greater severity.

> The immediate supervisor was identified as the harasser by 30 percent of the women victims of rape/assault, 20 percent of the victims of severe harassment, and 15 percent of the victims of less severe harassment. If one combines the figures for immediate supervisor and other higher level supervisors, persons with some presumed authority over the victim were named as harassers by 51 percent of the rape/assault victims, 44 percent of the severe harassment victims, and 32 percent of the less severe harassment victims. 57/

In view of the heavy involvement of supervisory personnel, it is not surprising that women victims generally rated all types of formal institutional remedies as relatively ineffective. In severe and less severe harassment, management was reported as doing nothing in 4-5 percent of

the cases and, perhaps as would be expected considering the heavy involvement of management in such incidents, in rape/assault incidents, management was reported to have done nothing in 17 percent of the cases. In addition, in severe and less severe harassment, management was reported to have taken a hostile position against the victim in 4-6 percent of the cases. When all of these actions are added together, it becomes increasingly apparent that initiation and implementation of remedies within the organization will be overwhelmingly difficult, even though this is the course which most victims would rather follow. The majority of employees were not even made aware by their organizations of the options open to them for dealing effectively with sexual harassment.

The result is what appears, indicated by the data, to be frustration and isolation among victims. While the study shows that the emotional, physical and psychological impact from sexual harassment is considerable, the damage to the victim's career may be most telling. Most victims are reluctant to make trouble and victim interviews show why. While the survey shows some effectiveness in dealing with incidents, interview data support the more general belief that only airtight cases survive the events which follow. For a woman attempting to build a career, a formal complaint can produce devastating results if the harassment itself does not. The Merit survey found that the most frequently cited reasons for not taking formal action were:

- o I thought it would make my work situation unpleasant.
- o I did not think anything would be done. 58/

Given involvement of management either in the incident or its aftermath, it is no wonder that 37 percent of the rape/assault victims stated: "I did not know what actions to take," and that 41 percent stated: "I did not want to hurt the person who bothered me."

Harassment and discrimination, whether narrowly or comprehensively defined, has been found to be one of the most serious employment problems facing women. In the restrictions which it imposes on women it is the means as well as the message, paralleling in the workplace methods found in society as a whole for subduing and directing the aspirations of women. That this is so is indicated by the results of studies and court cases cited above which show the heavy involvement of supervisory personnel in the most serious forms of overt sexual harassment as well as the most subtle sex discrimination. It is also shown by the indifference, unwillingness, inability, and even opposition which is often shown by management to providing relief for victims of even extreme forms of harassment, not to mention to providing a harassment-free and egalitarian work environment. Ironically, this attitude was shown in its most extreme form by officials of the U.S. Justice Department, whose mandate requires them to uphold the law, when they refused to cooperate with court orders regarding flagrant abuse of employee rights and sex discrimination -- the effects of which the court was ultimately powerless to remedy.

Perhaps this sort of open and flagrant violation of human rights as well as employee rights explains why, when it is brought into the open, sexual harassment becomes such a hot issue. For working women, all of whom face the likelihood of overt sexual harassment at some time during their careers, it must always be a "gut" issue. The Merit Systems study showed that this is the case at every level of income and rank; that even during the relatively short period of two years, 42 percent of those surveyed had been victimized at least once and a substantial number of them more than once. While the Merit Systems study identified incidents of overt sexual harassment, according to interview studies, subtle harassment is probably an even larger force. Because it involves conflicts about expectations based on "normal" or conventional social behavior between men and women, it is more ambiguous and more difficult to define and pinpoint.

The study of "micro-inequities" identifies in terms of specific instances, the translation or transformation, as it were, of patterns of social (socio-economic) behavior of men towards women within the structure of employment and the workplace. For many of those impatient for reform, these micro-inequities represent a "social gap" in the history of the development of the women's movement towards economic and social equality. While sex discrimination has been recognized in terms of actionable complaints, mainly with reference to overt sexual harassment, micro-inequities or "subtle" harassment is probably nearer to the leading edge of sex discrimination.

As described by Rowe and Bogart, micro-inequities constitute an invisible barrier for women in the same way that they apply to other objectives of discrimination. Looking at it from the point of view of the one being denied, it comes near, for women, to the "invisible man" concept explored in Ralph Ellison's novel of the 1950's. For those who let it, judging from victim studies, subtle discrimination appears to produce deep and lasting psychological and emotional damage. This is no doubt why many women prefer not to recognize sex discrimination at all or to deny its economic consequences by attempting to avoid challenging "the man" in arenas where confrontations are likely. The EEOC Guidelines on Discrimination Because of Sex recognize psychological effects of sexual harassment to the extent that "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." More than that, it has been found in victim studies to affect worker aspirations and produce emotional distress leading to physical illness and depression. Personal aspirations and emotional and psychological damage are social and economic realities which the court may not address directly in the absence of a specific, tangible injury which provides the basis for an "actionable complaint." The same limitations prevail in the case of social legislation restricted as it is to resolving problems.

Still, the actionable complaint and the social problem constitute a meeting ground between the legal and legislative process on the one hand and the concerns of the individual on the other. This study has recorded the clarification and expansion of the effective definition of sexual

harassment through the evolution of federal court judgements and legislation. In this regard, it has shown the responsiveness of the legal process to the growing pressure from individual complaints in relation to growing knowledge of the nature and extent of sexual harassment and sex discrimination. The report has provided a general review of the legal literature related to federal court decision in order to derive an effective definition of sexual harassment. It has also attempted to evaluate the potential impact of the application of victim case studies and survey data on the development of the basis for actionable, legal, complaint. In view of the enormous seriousness of the problem, this application and evolution can be seen in the form of a substantial and growing reform movement. And in view of the source of the pressures at its base, generated as they are by the movement of women into the paid labor force, the evolution of legal efforts can be expected to continue with growing force in the future.

Remedies

With the growing knowledge of sex discrimination of women in employment, there has also been growing efforts to develop remedies. Most of these efforts have been directed to developing legal and regulatory measures. Regarding the application of Title VII to prosecution of sexual harassment, it was observed in the 1976 review cited earlier 59/ based on legal remedies available at that time,

> Fashioning appropriate relief for sexual harassment should prove no more difficult than for other Title VII violations. The traditional Title VII remedies of reinstatement with or without back pay, an injunction against the employer to end its unlawful practices[85] and attorneys' fees for plaintiffs[86] can be applied to sexual harassment just as they have been applied to racial, ethnic and religious harassment. That the plaintiffs may have resigned should present no problem. Under Title VII, resignations due to discrimination are considered to be constructive discharges and are treated like outright discriminatory discharges;[87] thus they are remedied in the same way.

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[85] Title VII § 706(g), 42 U.S.C. § 2000e-5(g) (1970 & Supp. IV, 1974).

[86] Id. § 706(k), 42 U.S.C. § 20003-5(k) (1970).

[87] Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975); 1968-1973 CCH EEOC Dec. ¶ 6366, at 4666 (1972); cf. S.P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972) (constructive discharge is violation of NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970)).

While legal and regulatory actions have not been inconsiderable, still they have not been particularly effective in reducing the general level of sex discrimination. The range of actionable complaints has been narrowly conceived so far and the results of litigation have generally produced disastrous effects on victims. The Merit Systems survey indicates that most victims would rather handle sexual harassment incidents in a more direct way, but the measures which are available to them mainly involve forgiving and forgetting. In any case, they do not feel that formal methods open to them are effective.

Complaint and litigation as it has been used so far has proceeded on a case by case basis as though harassment is compulsive, aberrant, and uncommon behavior. In fact, the study shows, such behavior is very common and though no doubt compulsive, it probably constitutes unformulated social and economic policy as embodied in conventionally acceptable behavior rather than pure sexual desire. In most cases, though knowledge of the existence of harassment in an organization is reflected in employee turnover rates, victims tend to isolate themselves through fear of being exposed and of becoming vulnerable to retaliation. Because of this secrecy and acceptance of harassment as part of the work environment, the larger pattern, described here in hierarchical terms, is only beginning to emerge. How to deal with such an insidious and endemic problem is the next obvious matter for speculation.

Many researchers, Rowe and Bogart among them, have observed that when clear management policies prohibiting harassment, information about remedies, and standard procedures for dealing with incidents are introduced, complaints may increase for at least a period of time, but that if the policies are maintained, the number of complaints will later decline reflecting an apparent decrease in the number of incidents. Unfortunately, experience with efforts to reduce harassment is not yet sufficient in scope or duration to establish conclusively that harassment will actually decline under such circumstances, but the experience from litigation efforts is more decidedly discouraging at this time. In any event, given the extent of the problem and the desires expressed by victims, more efforts to develop effective general non-legal remedies appear called for. Obviously, in view of the heavy involvement of management in the problem as harassers themselves, such an approach would require an extensive educational program.

However comprehensive and effective legal remedies to sexual harassment and sex discrimination may become, the Merit Systems survey confirmed what has also been learned from victim studies -- that the majority of women prefer to resolve incidents of sexual harassment and sex discrimination within the organization and without resorting to court case. At present, however, according to the Merit Systems study, attempts at resolution from within are seldom effective compared with assistance from outside.

With the increasing frequency and scope of litigation and Federal regulation as well as growing advocacy pressure, officials at the highest levels of government and industry are becoming concerned with the appearance of harassment in their organizations. Federal contract procedures require compliance with regulations prohibiting discrimination. Although heavily involved in harassment themselves, non-supervisory employees are probably most responsive to directives by management prohibiting such behavior, as well as its implied encouragement and approval. It is management (supervisory co-workers and immediate or other higher-level supervisors) which has the responsibility and opportunity to set the tone and establish the environment of an organization. The findings of this study suggest that harassment and sex discrimination result from policies deriving primarily from within the ranks of management. If this is so, then the focus of remedies must be directed more specifically to this area of administration.

The Merit Systems study found that supervisors are often the perpetrators of sexual harassment. In cases where they are not the perpetrators, however, they were found by about 80 percent of the victims to be ineffective as a source of relief. But over and above these obstacles to dealing with the problem within the organization, in a discouragingly large number of cases, according to case studies of victims, reporting an incident involving sexual harassment or sex discrimination usually leads to the labeling of the victim as a "troublemaker", rather than resolution of the matter in her favor. Obviously, more will be needed of an educational nature to improve management's ability to deal with the problem. They will also need to understand the nature of employee rights in this matter and that, increasingly, those rights are being interpreted with greater scope and effectiveness by the courts.

The growing general awareness of the problem of harassment and sex discrimination by both employees and employers is being made more acute by the growing demand by women for career opportunities equal to men as well as for egalitarian, non-discriminatory, and harassment-free working conditions. The demand for solutions is thereby made increasingly insistent. The alternative remedies open to women employees reflect alternatives for employers as well. The choice is clearly indicated in the findings which have been reviewed here: either ways are found for dealing effectively with the problem within the organization through fair administrative regulations and effective grievance procedures, or they will be found outside the organization in the courts and advocacy efforts. Either way, it is clearly not a choice which the perpetrators or victims themselves can make. Self-policing of harassment and discrimination is not possible in a system which promotes it, and effective complaint is not possible where there is ignorance of alternatives and intimidation. Given these circumstances, if it is to come from within the organization, as is generally desired, change must be initiated and implemented from the very top.

FOOTNOTES

1/ Survey by the Merit Systems Board, to be discussed more fully below. Overt Sexual Harassment, though extensive itself, as the Merit Systems survey shows, is much less than sex discrimination as a whole -- which includes subtle or sexist harassment.

2/ Source: Women in the Labor Force series, Bureau of Labor Statistics.

3/ Source: Data for 1900-1970, Historical Statistics of the United States, Colonial Times to 1970, Bureau of the Census; current data, Employment and Earnings, Bureau of Labor Statistics.

4/ 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975).

5/ See Note, Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition, 76 Mich. L. Rev. 1007-1009 (1978).

6/ Allen v. Lovejoy, 553 F.2d 522 (6th Cir. 1977).

7/ Manhart v. City of Los Angeles, 553 F.2d 581 (9th Cir. 1976).

8/ Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

9/ Fansdale v. United Airlines, Inc., 437 F.2d 454 (5th Cir. 1971).

10/ Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), rev'd on other grounds, 562 F.2d 55 (9th Cir. 1977).

11/ Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976), rev'd, 600 F.2d 211 (9th Cir. 1979).

12/ Barnes v. Costle, 561 F.2d 983 (3rd Cir. 1977); Tomkins v. Public Service Elec. & Gas Co., 568 F.2d 1044 (3rd Cir. 1977); Garber v. Saxon Bus. Products, 552 F.2d 1032 (4th Cir. 197?); Heelan v. Johns-Manville Corp., 451 F. Supp. 459 (D. Mich. 1977).

13/ Barnes v. Costle, 561 F.2d at 983, 989, n. 49 (D.C. Cir. 1977).

14/ 568 F.2d at 1049-50.

15/ 451 F. Supp. at 460.

16/ 561 F.2d at 993.

17/ Luddington v. Sambo's Restaurants, (D. Wis. 1979).

18/ Barnes v. Costle, 561 F.2d at 993.

19/ 29 C.F.R. § 1604.

20/ Civil Action No. 29-1693 (decided January 12, 1981).

21/ Id. at 22.

22/ Id. at 13-14.

23/ Id. at 16.

24/ Id. at 18.

25/ 22 FEP Cases 1808 (Minn. S. Ct., 1980).

26/ 22 FEP Cases at 1813.

27/ Amicus Brief for Appellee by the National Organization for Women, Continental Can v. Minnesota, 22 FEP Cases 1808 (1980).

28/ 1968-1973 CCH EEOC Dec. ¶ 6347 (1972).

29/ 1968-1973 CCH EEOC Dec. ¶ 6160 (1970).

30/ 1968-1973 CCH EEOC Dec. ¶ 6347 (1972).

31/ 454 F.2d 234, (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

32/ "Sexual Harassment," 51 N.Y.U. L. Rev. 148 (1976).

33/ E.g., Barnes, 561 F.2d at 993; Miller, 600 F.2d at 211; Ludington, 474 F. Supp. at 483.

34/ Rowe v. General Motors Corp., 459 F.2d 348, 359-60 (5th Cir. 1972).

35/ Macey v. World Airways, Inc., 13 Empl. Prac., Dec. ¶ 11, 581 (N.D. Cal. 1977).

36/ Anderson v. Methodist Evangelical Hosp., Inc., 464 F.2d 723, 725 (6th Cir. 1972). See "Sexual Harassment," 76 Mich. L. Rev. at 1025.

37/ EEOC 29 C.F.R. § 1604.11(c) (1980) (See Appendix A).

38/ 1968-1973 CCH EEOC Dec. ¶ 6354 at 4639 (1972).

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49/ Ibid., Part of this Summary included a separate presentation made orally from a written "script."

50/ Goodman, Jill, "Women's Work: Sexual Demands on the Job," Civil Liberties Review, March/April, 1978.

51/ Rowe, op. cit., p. 17.

52/ U.S. Merit Systems Protection Board, op. cit., script.

53/ U.S. Merit Systems Protection Board, op. cit., p. 11.

54/ Tell, Frank J., op. cit., p. 56.

55/ Ibid. See Appendix A for a copy of this letter.

56/ U.S. Merit Systems Protection Board, op. cit., p. 22.

57/ Ibid., p. 37.

58/ Ibid., p. 62.

59/ "Sexual Harassment," N.Y.U. L. Rev., op. cit., p. 166.

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